Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVISTER CORPORATION,

Petitioner,

--v--

UNITED REPUBLIC LIFE INSURANCE COMPANY AND ROBERT E. WILCOX, UTAH INSURANCE COMMISSIONER AND LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Federal Arbitration Act is reverse preempted, under the McCarran-Ferguson Act, by a state procedural law staying actions against an insurer under an order of liquidation when the dispute to be arbitrated does not involve the business of insurance.

II. Whether the McCarran-Ferguson Act divests a party of a forum in federal court, under diversity jurisdiction, to pursue its rights under the Federal Arbitration Act.

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding before the United States Court of Appeals for the Tenth Circuit are listed on the caption of the court's opinion. The petitioner, Davister Corporation, was the appellant in the proceeding below. United Republic Life Insurance Company and Robert E. Wilcox, Utah Insurance Commissioner and Liquidator of United Republic Life Insurance Company, were the appellees and are the respondents here.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONER

Davister has no parent companies nor any nonwholly owned subsidiaries. United Republic Life Insurance Company is a wholly owned subsidiary of Professional Investors Insurance Group, Inc.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully requests that this Court issue a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, issued and entered on August 28, 1998.

OPINIONS BELOW

The Tenth Circuit's Opinion, which is set forth at Appendix A, is reported at 152 F.3d 1277. The district court's unpublished Order entered on January 4, 1996, is set forth at Appendix B. The unpublished Order of the district court entered on February 16, 1996, dismissing without prejudice the Petition for Order Compelling Arbitration and Stay is set forth at Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 28, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved in this case: U.S. Const. Art. III, § 2 cl.1 and Art VI, cl. 2 (Appendix D); relevant sections of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (Appendix E); relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (Appendix F); 28 U.S.C. § 1332(a) (Appendix G); and Utah Code Ann. §§ 31A-27-101(2) and -317(a) (Appendix H and I).

STATEMENT OF THE CASE

A. Proceedings Before the District Court

In 1992, Petitioner, Davister Corporation ("Davister"), and Respondent United Republic Life Insurance Company ("United Republic") entered into a written agreement (the "Agreement") in which United Republic agreed to transfer a portion of its stock to Davister in exchange for one hundred percent (100%) of the stock of

R.G. Acquisition Corporation ("RGA"). (App. 3a.) Pursuant to the Agreement, United was to receive certain real property and related interests in Waco, Texas, that were RGA's principal assets. (App. 3a.)

After the execution of the Agreement, Respondent Robert E. Wilcox (the "Commissioner" or "Liquidator"), the Commissioner of the Utah Insurance Department, informed United Republic that the Agreement must be reversed because United Republic had not obtained prior authorization from the Utah Insurance Department to issue stock as payment for the RGA stock. (App. 3a.) Although Davister requested the return of its RGA stock for lack of consideration, the Commissioner seized United Republic by order of a state court in Utah. (App. 3a.) The Commissioner also brought an action in Texas to acquire control of the Waco real property and related interests (the "Texas Action"). (App. 3a.) Davister intervened in the Texas Action on grounds that United Republic was obligated to return the RGA stock and related properties for failure of consideration under the Agreement. (App. 3a.)

Later, the Commissioner obtained an order from the Utah state court appointing him the Liquidator of United Republic. (App. 3a.) The court further ordered that all actions against United Republic be stayed. (App.3a.) As a result, the Texas court stayed Davister's claims pending against United Republic. (App. 3a.)

Davister then filed a petition in the United States District Court for the District of Utah seeking an order compelling the Commissioner and United Republic to arbitrate the dispute regarding the Texas property interests pursuant to the Agreement between United Republic and Davister. (App. 4a.) Davister also sought a stay of the Texas Action and the Utah case. (App. 4a.) The district court had jurisdiction over the petition on the basis of diversity of citizenship under 28 U.S.C. § 1332. A hearing was held before the district court, and the court abstained from compelling arbitration and declined to stay the Texas Action. (App. 4a.) Davister appealed the

district court's orders refusing to compel arbitration and to stay the Texas Action and Utah proceedings. (App. 4a.)

B. The Opinion of the United States Court of Appeals for the Tenth Circuit.

1. The Majority Opinion

On appeal, the Tenth Circuit concluded, in a divided opinion,[1] that the issues "must be resolved under the McCarran-Ferguson Act, not under other doctrines of abstention." (App. 2a.) Accordingly, the court considered Davister's argument that, under the United States Supreme Court's opinion in *United States v. Fabe*, 508 U.S. 491 (1993), the McCarran-Ferguson Act did not reverse preempt the Federal Arbitration Act ("FAA"), which sets forth a strong policy of submitting disputes to arbitration when the parties have so agreed. (App. 4a-5a.) The court interpreted *Fabe* as establishing a three-part test for determining the applicability of the McCarran-Ferguson Act: "(1) does the federal statute at issue 'specifically relate to the business of insurance'; (2) was the state statute enacted 'for the purpose of regulating the business of insurance'; (3) would application of the federal statute 'impair, interfere, or supersede' the state statute?" (App. 5a, at n. 1.) Although the court went on to apply the three-part test,[2] it determined that, "[b]ecause *Fabe* dealt only with competing claims for priority of distribution in a liquidation setting, it does not completely inform our decision." (App. 7a.) The court framed the issue on appeal as "whether rights created under the Federal Arbitration Act must give way to a state court blanket stay in the liquidation setting." (App.

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[1] Judge Porfilio wrote the court's opinion, in which Judge Murphy concurred. Judge Lucero filed a dissenting opinion.

[2] The court did not address the first part of the test because the Federal Arbitration Act does not specifically relate to the business of insurance.

8a.)

To resolve the issue on appeal, the court relied almost exclusively on the Fifth Circuit's opinion in *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *petition for writ of cert. filed*, Case No. 98-315. In *Munich*, the Fifth Circuit reviewed a district court's order dismissing a petition to compel arbitration on grounds of the *Burford* abstention doctrine. (App. 8a.) Considering the second prong of the *Fabe* test, the Fifth Circuit concluded that

> the statute at issue here--vesting exclusive original jurisdiction of delinquency proceedings in the Oklahoma state court ***and authorizing the court to enjoin any action interfering with the delinquency proceedings***--are laws enacted clearly for the purpose of regulating the business of insurance.

(App. 8a (quoting *Munich*, 141 F.3d at 592-93).) The Fifth Circuit rejected the appellants' argument that, because the Oklahoma statute benefited creditors as well as policyholders, the statute did not pass the second prong of the *Fabe* test. (App. 9a.) The Fifth Circuit concluded that, although non-policyholders could benefit from the liquidation statute, the benefits inuring to policyholders were not insignificant and were indistinguishable from the Ohio statute in *Fabe* granting preference to administrative expenses. (App. 9a.)

Finally, the Fifth Circuit concluded that the third prong of the *Fabe* test was satisfied because the appellants were seeking an action against the liquidator outside of the Oklahoma state court, an action "expressly prohibited" by the Oklahoma liquidation statute. *Munich*, 141 F.3d at 595. The Fifth Circuit recognized that the issue of impairment is "not well settled" among the circuit courts of appeals. *Id.*

Relying on *Munich*, the Tenth Circuit concluded that the Utah

statute "consolidating all claims against a liquidating insurer . . . was enacted to protect policyholders."[3] (App. 10a.) The Tenth Circuit further relied on *Utah Code Ann. § 31A-27-317(a)* ("The filing of a petition for liquidation of a domestic insurer or of an alien insurer domiciled in this state stays all actions and all proceedings against the insurer in Utah or elsewhere. . . ."). The court concluded that the stay "prevents conflicting rulings on claims, the unequal treatment of claimants, and the unnecessary and wasteful dissipation of the remaining funds of the insolvent insurer." (App. 11a.) On these grounds, the court determined that "the Utah statute meets the test of having been enacted for the purpose of regulating the business of insurance." (App. 11a.) The court did not consider Davister's arguments that Davister's Agreement with United Republic had no connection to the business of insurance.

Addressing the third prong of the *Fabe* test, the court concluded that "[a]llowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue and force arbitration contrary to the blanket stay . . . would certainly impair the progress of the orderly resolution of all matters involving the insolvent company." (App. 12a.) The court further determined that enforcement of arbitration "would directly impact the policyholders because it deals with a purported asset of the insurance company that could be apportioned to them."[4] (App. 12a.)

2. The Dissenting Opinion

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[3] The specific statute cited by the Tenth Circuit is Utah Code Ann. § 31A-27-101(2), which provides, in part, as follows: "The purpose of this chapter is the protection of the interests of insured, creditors, and the public generally. . . ." (App. 11a.)

[4] In reaching this conclusion, the majority seems to ignore the underlying dispute between Davister and the Liquidator -- that United Republic has no right to claim ownership of the Waco real property interests due to the lack of consideration paid.

In his dissenting opinion, Judge Lucero argued that the majority's opinion sweeps too broadly and could potentially preclude "federal jurisdiction over any dispute involving an insolvent insurance company." (App. 17a.) In particular, Judge Lucero disagreed with the majority's application of the *Fabe* test. Judge Lucero emphasized that *Fabe* requires a "close inquiry" into the question of whether the specific provisions of the state statute implicates the business of insurance. (App. 14a.) Judge Lucero argued that the majority had failed to perform such a detailed inquiry, although the majority countered that it had closely examined the specific statute at issue. (App. 14a.) Judge Lucero went on to criticize the majority's analyses and conclusions under the second and third prongs of the *Fabe* test.

Analyzing the second prong of the *Fabe* test, Judge Lucero argued that the facts before the court "are not related to the business of insurance as defined in *Fabe*." (App. 15a) Although recognizing that policyholders may be affected "by any claims on the assets of insolvent insurers by potential creditors," Judge Lucero noted that *Fabe* rejected such indirect benefits to policyholders as "pertaining to the 'business of insurance.'" (App. 14a.) Judge Lucero relied on the First Circuit's opinion in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), in which the court refused to interpret a filing-deadline statute as a regulation of policyholders, since the statute helps both creditors and policyholders to the same extent. (App. 15a.) Noting the similarity between the filing deadline in *Garcia* and the stay provisions of the Utah state, Judge Lucero argued that "a blanket stay of all arbitration proceedings is of general benefit to all creditors and not specifically for the benefit of policyholders." (App. 15a.)

Continuing his analysis of the second prong, Judge Lucero recognized that the facts of this case in no way pertain to the business of insurance, a factor not addressed by the majority. Judge Lucero pointed out that "Davister is neither a policyholder of United Republic nor an insurer of United Republic's policies. The contract to be interpreted is a real estate contract. Though an insurance company,

albeit now insolvent, is a party, the contract has no connection to policyholders or their policies." (App. 16a.)

Finally, Judge Lucero argued that the third prong of the *Fabe* test was not met because "this is not a case where the enforcement of the federal right would conflict with a specific provision of a state law precluding arbitration in insurance cases or insurance liquidation proceedings." (App. 16a.) Judge Lucero noted that Utah has no statute "mandating against arbitration in the insurance context." Under these circumstances, Judge Lucero concluded that enforcement of the Federal Arbitration Act would not invalidate, impair, or supersede Utah law governing insurance liquidation. (App. 16a.)

For the reasons that follow, this Court's review of the Tenth Circuit's decision is warranted.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's holding that procedural provisions of the state insurer liquidation acts reverse preempt the FAA under the McCarran-Ferguson Act and that the McCarran-Ferguson Act allows state courts to enjoin federal actions, and the similar holdings of the Second Circuit and Fifth Circuits, directly conflicts with the decisions of the First, Third, Eighth and Ninth Circuits. As a result, a party that seeks to enforce its contractual rights by moving a federal court to compel the liquidator of an insolvent insurance company to arbitrate will face different outcomes in different circuits. The motion would succeed in the First, Third, Eighth, and Ninth Circuits, but not the Second, Fifth, or Tenth Circuits.

The Tenth Circuit's decision undermines the strong federal policy favoring arbitration, reflected in the FAA and acknowledged by this Court, by eviscerating the federal right to enforce agreements to arbitrate if one party becomes insolvent. The Tenth Circuit's decision also allows state courts to oust federal courts of their

diversity jurisdiction in actions against insurance companies. Finally, the Tenth Circuit's misapplication of this Court's decisions in *Fabe* and other McCarran-Ferguson Act cases will lead to confusion and misunderstanding in the law in determining whether procedural provisions of state insurer liquidation laws are "impaired" by federal laws and whether laws regarding the procedures for adjudicating disputes are laws regulating the "business of insurance."

The issues in this case, and a related petition for writ of certiorari,[5] are certain to recur time and again. Virtually every State has an insurer liquidation act similar to the *Utah Insurance Code*. Consequently, whether the liquidator of an insolvent insurance company can be compelled under the FAA to arbitrate disputes arising out of a non-insurance contract is likely to be relitigated unless guidance is provided by this Court.

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[5]American Re-Insurance Company and NAC Reinsurance Corporation filed a Petition for Writ of Certiorari with the United States Supreme Court, Case No. 98-315, which addresses many of the same issues. The major distinction between this case and the *American Re-Insurance* petition is that Davister is not involved in any respect in the "business of insurance" and simply entered into a real estate contract with United Republic.

I. THE TENTH CIRCUIT'S OPINION THAT, UNDER *FABE*, THE FEDERAL ARBITRATION ACT IS REVERSE PREEMPTED BY UTAH'S STATUTE IMPOSING STAYS IN INSURANCE-LIQUIDATION PROCEEDINGS, ALONG WITH SIMILAR OPINIONS IN THE FIFTH AND SECOND CIRCUITS, CONFLICTS WITH DECISIONS IN THE FIRST, THIRD, EIGHTH, AND NINTH CIRCUITS.

A. Interpretation of laws enacted "for the purpose of regulating the business of insurance."

The issue of whether the Federal Arbitration Act ("FAA") and similar federal statutes are reverse preempted, under the McCarran-Ferguson Act, by state statutes governing insurer-liquidation proceedings is the subject of conflict among the circuit courts of appeals. In particular, the courts have reached divergent results under the "business of insurance" prong of the *Fabe* test. The conflict largely results from differing interpretations of *Fabe*'s limitation on statutes enacted for the purpose of regulating the business of insurance to those regulating "policyholders." *Fabe*, 508 U.S. at 508. As this Court stated, to the extent that a state statute "is designed to further the interests of other creditors" [other than policyholders], the statute was not enacted for such purpose. *Id.*

The majority in this case relied almost exclusively on the Fifth Circuit's recent decision in *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *petition for writ of cert. filed*, Case No. 98-315. In *Munich*, a reinsurance company filed a petition in federal district court to compel arbitration of a dispute arising out of the reinsurance agreement with an insurer in liquidation. *See id.* at 587. The Oklahoma liquidation statute vested exclusive jurisdiction of insurer delinquency proceedings in state court. *Id.* at 592. Addressing the *Fabe* test, the Fifth Circuit concluded that, because the statute was "aimed at protecting the relationship between the insurance company and its policyholders,"

it was enacted for the purpose of regulating the business of insurance. *Id.* at 593.

The *Munich* court relied on the Second Circuit's opinion in *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995), in which the court considered whether the FAA was preempted by a Kentucky statute prohibiting the compelling of arbitration against an insurance liquidator. *See id.* at 43. The *Stephens* court held that the prohibition against arbitration was a law enacted for the purpose of regulating the business of insurance because it governed "the performance of insurance contracts once an insurance company (or a reinsurance company) is declared insolvent and enters liquidation." *Id.* at 44. The court further stated that the statute served to protect the expectation of the parties to an insurance policy that, in case of insolvency, "the insurance company will be liquidated in an organized fashion." *Id.* at 45. Unlike the Kentucky statute, however, Utah's insurer-insolvency statute does not, as recognized by Judge Lucero, prohibit arbitration in liquidation proceedings. (App. 16a.)

The Tenth Circuit's opinion, along with *Munich* and *Stephens*, conflicts with similar opinions issued by the First, Third, and Ninth Circuits. For instance, in *Garcia v. Island Program Designer, Inc.*, 3 F.3d 57 (1st Cir. 1993), the court considered the conflict between a federal statute giving the government's claims first priority in certain insolvency proceedings[6] and a Pennsylvania statute granting timely filed claims priority over late-filed claims. The court held that the filing-deadline statute, a procedural statute similar to Utah's statute governing stays in liquidation proceedings, was not enacted for the purpose of regulating the business of insurance because the statute "helps policyholders only to the extent that (and in

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[6]Although *Garcia* did not consider the FAA, the court's analysis of whether the Pennsylvania statute was enacted for the purpose of regulating the business of insurance is instructive in demonstrating that certain aspects of the liquidation process are procedural rather than substantive and should not give way to a party's federal rights.

the same way as) it helps all creditors." *Id.* at 62. Doubting that the statute is necessary to protect policyholders, the court reasoned that the filing deadline may encourage speedy and orderly liquidation proceedings, "thereby (perhaps) reducing the risks (and costs) of extending credit to the company." *Id.* The court concluded that, even without the filing deadline, "liquidation would still prove manageable." *Id.* These are precisely the same concerns raised by Judge Lucero in his dissent: Utah's "blanket stay of all arbitration proceedings is of general benefit to all creditors and not specifically for the benefit of policyholders." (App. 15a.)

Similarly, in *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 8 F.3d 953 (3d Cir. 1993), an insurance commissioner brought suit on behalf of an insolvent insurance company against reinsurers to recover an alleged debt. The defendants removed the case to federal court and petitioned the court to compel arbitration of the dispute. *See id.* at 955. Emphasizing that the dispute was simply over whether the debt was owed by the reinsurers, a dispute similar to the issue in this case, the court concluded that the dispute "has nothing to do with Pennsylvania's regulation of insurance." *Id.* at 960. Like Davister's dispute with United Republic, the dispute in *Grode* was an "ordinary contract action" that just happened to involve an insolvent insurance company. *See id.* at 961.

Finally, in *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992), the court examined Montana's liquidation statute conferring "broad jurisdiction over insurance insolvency proceedings and complete control and authority over the insolvent's assets." *Id.* at 972. The court held that compelling arbitration would not interfere with the liquidation proceedings and that the insurance commissioner had not shown that "the parties did not intend to enforce their arbitration clauses when a party became insolvent." *Id.*

As reflected in the foregoing opinions, when construing state statutes governing procedural matters in insurer-liquidation proceedings, the circuit courts of appeals have reached conflicting

results. The conflict is reflected in the majority and dissenting opinions in this case: the majority concluding that Utah's statutory blanket stay protects the assets of the insolvent insurer for the benefit of policyholders, and the dissent arguing that the stay protects policyholders only to the extent it protects all creditors. (Appendix A.) The conflict among the circuits over the proper scope of *Fabe*, as it pertains to state statutes governing procedural matters in insurer-insolvency proceedings, is ripe for this Court's intervention and resolution.

B. Interpretation of "invalidate, supersede, or impair."

A second point of conflict among the circuit courts is the proper interpretation of "invalidate, supersede, or impair" under the McCarran-Ferguson Act. Again, the conflict may be found in the majority and dissenting opinions in this case. The majority concluded that "[a]llowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue and force arbitration contrary to the blanket stay . . . would certainly impair the progress of the orderly resolution of all matters involving the insolvent company." (App. 12a.) Judge Lucero, however, argued that "this is not a case where the enforcement of the federal right would conflict with a specific provision of a state law precluding arbitration in insurance cases or insurance liquidation proceedings." (App. 16a.) In *Fabe*, this Court did not discuss the "impairment" prong of the McCarran-Ferguson Act because the parties agreed that application of the federal statute would impair or invalidate the state insurance statute. *Fabe*, 508 U.S. at 501.

In concluding that application of the FAA would impair the Utah insolvency statute, the Tenth Circuit relied on the *Munich* court's conclusion that the FAA would impair the Oklahoma liquidation statute because arbitration would conflict with "Oklahoma law giving the state court the power to enjoin any action interfering with the delinquency proceedings." *Munich*, 141 F.3d at 595. The

Munich court held that the appellants had "invoked the FAA to obtain what the state court injunction expressly prohibited--an action against [the] receiver to be adjudicated in a forum outside the Oklahoma state court." *Id.*

Other circuit courts, however, have refused to hold that arbitration or similar actions would impair or invalidate the state insurance statute at issue. For instance, in *Grode*, the First Circuit held that arbitration would have "no negative effect on the state's regulatory program." *Grode*, 8 F.3d at 960. The court emphasized that "the dispute underlying this appeal is an ordinary contract action in which the plaintiff happens to be an insolvent insurance company." *Id.* at 961. As a result, the "state regulatory scheme will not be disrupted by a federal court's disposal of such a claim." *Id.*; *see also Villafane-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996) (concluding that no impairment exists if influence on statute is merely indirect).

Similarly, the Eighth Circuit rejected the insolvent insurer's argument that prosecution of an action under the Age Discrimination in Employment Act in federal court would impair the state statute's "comprehensive scheme for efficiently and equitably liquidating insolvent insurance companies." *Murff v. Professional Medical Ins.* 97 F.3d 289, 292 (8th Cir. 1996). The court allowed the ADEA case to go forward, despite the pending insolvency proceeding, because "the adjudication of an ADEA claim in federal court would not so substantially impair the deputy receiver's ability to effect . . . liquidation under the Insolvency Act as to run afoul of the proscriptions of the McCarran-Ferguson Act." *Id.*

A similar line of cases discussing whether the Racketeer Influenced and Corrupt Organizations Act (RICO) is reverse preempted by state insurance laws reflects the conflict among the circuit courts on this topic. For instance, the Third Circuit recognized that "Courts of Appeals jurisprudence is in disarray as to the extent and meaning of invalidate, impair, or supersede under the

[McCarran-Ferguson] Act." *Sabo v. Metropolitan Life Ins. Co.* 137 F. 3d 185, 193 (3rd Cir. 1998) *petition for writ of cert. filed* Case No. 98-2. The court noted that, in RICO cases, the First, Seventh, and Ninth Circuits have adopted a test focusing on a "direct conflict in the substantive provisions of the federal and state statutes at issue." *Id.* Other circuits, such as the Fourth and Eighth Circuits, have held that, notwithstanding the lack of any conflict in the substantive provisions of the state and federal statutes, RICO's allowance of "drastic" remedies conflicts with state provisions allowing only for less-harsh administrative remedies. *Id.* at 193-94.

The conflict in the RICO cases is relevant here because the Tenth Circuit, along with the *Munich* court and others, implicitly concludes that the impairment analysis applies to procedural, not just substantive, measures of the state insurance law at issue. (App. 11a-12a.) The Utah statute identified in this case imposing stays in liquidation proceedings is merely a procedural device. In *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997), the Eighth Circuit held that application of the "extraordinary remedies of RICO would frustrate, and perhaps even supplant, Minnesota's carefully developed scheme of regulation." *Doe*, 107 F.3d at 1307-08. In contrast, the Sixth Circuit has held that "McCarran-Ferguson protects the **substantive** measures embodied in state law." *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996) (emphasis added). A party seeking the protection of McCarran-Ferguson must identify "some substantive aspect of the state law that is being invalidated, impaired, or superseded." *Id.*

As indicated in the foregoing analysis, the circuit courts of appeals are in conflict regarding the proper analysis and interpretation of the McCarran-Ferguson Act. Petitioner respectfully requests that this Court grant the writ to resolve the courts' differing interpretations of the McCarran-Ferguson Act, as set forth above.

II. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUITS CONSIDERING WHETHER THE SPECIFIC CONDUCT AT ISSUE CONSTITUTES THE BUSINESS OF INSURANCE.

A fundamental distinction between the majority and dissenting opinions in this case is Judge Lucero's recognition that Davister's dispute with United Republic over the real property interests in Texas had no relation to the business of insurance. (App. 15a.) The majority, on the other hand, did not consider this crucial element: whether the subject of the proposed arbitration constituted the business of insurance. Indeed, the approaches taken by the majority and Judge Lucero reflect a disagreement among the circuits regarding the proper test to be employed under *Fabe* to determine the applicability of the McCarran-Ferguson Act.

The conflict among the circuits is due to disagreement over the proper role of *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), in cases not involving the antitrust clause of section 2(b) of the McCarran-Ferguson Act. In *Pireno*, this Court followed the test previously established in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), for determining whether a particular practice constitutes the business of insurance under the antitrust exemption of section 2(b). Under the test, the relevant criteria are (1) "whether the practice has effect of transferring or spreading a policyholder's risk," (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured," and (3) "whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129. In *Fabe*, this Court recognized the distinction between *Royal Drug* and *Pireno*, which focused on the antitrust exemption of section 2(b), and subsequent cases involving the first clause of section 2(b). *See Fabe*, 508 U.S. at 502. This Court, however, went on to apply the *Royal Drug-Pireno* test to the Ohio priority statute at issue. *See id.* at 502-03.

Courts deciding McCarran-Ferguson Act issues after *Fabe* have interpreted *Fabe*'s use of the *Royal Drug-Pireno* test differently. For instance, in *Sabo*, the court disagreed that the three-part test is irrelevant in "determining what constitutes the business of insurance in a non-antitrust context." *Sabo*, 137 F.3d at 191 n.3. "As *Fabe* makes clear, the *Royal Drug* test is only a starting point in the analysis for non-antitrust cases." *Id.* Similarly, in *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995), the court concluded that, although *Pireno* and *Royal Drug* both involve the second clause of section 2(b), this Court in *Fabe* "used the test in the context of deciding whether an Ohio priority statute was preserved from preemption by the first clause of McCarran-Ferguson, which is similar to the issue before this Court." *Id.* at 44 n.2.

Conversely, in *Doe*, the Eighth Circuit concluded that, although the parties in the case had apparently agreed to the contrary, the application of the McCarran-Ferguson Act "does not require a specific conclusion that the allegedly improper activities [in the case] constituted the 'business of insurance.'" *Doe*, 107 F.3d at 1305 n.8. The court interpreted *Fabe* as limiting application of the *Royal Drug-Pireno* test to "cases involving a conflict between a state law and federal antitrust law, a conflict which is the subject of a separate provision of the McCarran-Ferguson Act." *Id.*

The conflict among the circuits is set forth in greater detail in *Sabo*. The court noted that "federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion." *Sabo*, 137 F.3d at 189 n.1. Some courts, including the Second, Third, Sixth, and Ninth Circuits, follow a four-part test that includes consideration of the parties' conduct, while other courts, including the First and Eighth Circuits, use "a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance." *Id.* The court recognized that some courts have determined that the three-part *Royal Drug Co.* test is not applicable in non-antitrust cases. *See id.* at 191 n.3.

In *Sabo*, the court discussed the need to consider the conduct of the parties as follows:

> In addressing the issue of preclusion under § 1012(b), we read no more into the statute than what is says: unless a federal law specifically relates to the business of insurance, it will not be applied when it "invalidates, impairs, or supersedes" a state law "enacted for the purpose of regulating the business of insurance." If the defendant's conduct does not constitute "the business of insurance," then the Act simply does not apply. . . . **We cannot imagine how section 1012(b) protects a state law enacted for the purpose of regulating the insurance business when the activity in question does not relate to insurance.**

Id. at 190 (emphasis added). The court went on to hold that the conduct of the insurance company, which was alleged to have, among other things, "coerced agents to fraudulently trade insurance policies in order to accumulate commissions and decrease the value of outstanding policies," constituted the business of insurance under the McCarran-Ferguson Act. *Id.* at 187, 191.

The McCarran-Ferguson analysis was similarly framed by the Sixth Circuit in *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996), in which the court considered whether the defendant bank violated RICO when it bought additional coverage under insurance policies acquired for owners of cars purchased through the bank's financing and when it failed to pass on rebates to the plaintiffs that were given by the insurance company. Following *Pireno*, the court concluded that Transamerica, the co-defendant insurance company, was "clearly engaging in the business of insurance by providing policies that spread the Bank's and the plaintiffs' risks." *Id.* at 391. The court further noted that "the policies and the receipt

of premiums are the essence of the policy relationship between the insurer and the insured." *Id.* The court went on, however, to hold that the defendant bank could not invoke the protections of the McCarran-Ferguson Act because it "cannot claim here that it was engaged in the practice of risk spreading or transferring risk." *Id.* at 393.

Like the Third and Sixth Circuits, the Ninth Circuit has considered whether the specific conduct of the parties constitutes the business of insurance. In *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co, Inc.*, 50 F.3d 1486 (9th Cir. 1995), the plaintiff brought suit against its former insurance broker alleging fraud in certain billing practices. The district court dismissed the complaint on grounds that the McCarran-Ferguson Act preempted application of RICO to the plaintiff's claims. *Id.* at 1488. On appeal, the Ninth Circuit considered the four-part test set forth in *Cochran v. Paco*, 606 F.2d 460 (5th Cir. 1979), which includes inquiry into whether the specific acts "challenged under the statute constitute the business of insurance." *Merchants*, 50 F.3d at 1489. Following the *Pireno* factors, the court concluded that only one of the alleged fraudulent activities constituted the business of insurance: "[o]vercharging for premiums on actual policies." *Id.* at 1490. The other acts, collection of premiums on nonexistent policies and collection for false claims, had no relationship to the business of insurance. *Id.* at 1490-91.

On the other hand, some circuit courts do not apply the *Royal Drug-Pireno* test to determine the applicability of the McCarran-Ferguson Act. For instance, in *Doe*, the court refused to consider whether the conduct at issue constituted the business of insurance. *Doe*, 107 F.3d at 1305-06. *See also Murff*, 97 F.3d at 291. Similarly, in *United States v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616 (1st Cir. 1996), the court addressed the issue of whether the Medicare Secondary-Payer Act was reverse preempted by a state

insurance-insolvency statute. *See id.* at 617.[7] Without relying on the *Royal Drug-Pireno* factors, the court determined that the federal statute specifically related to the business of insurance. *See id.* at 622. *See also Villafane-Neriz v. FDIC*, 75 F.3d 727, 735 (1st Cir. 1996) (using truncated three-part test under the McCarran-Ferguson Act omitting consideration of whether the specific conduct constitutes the business of insurance).

This Court should resolve the conflict among the circuits regarding the proper analytic framework to determine the applicability of the McCarran-Ferguson Act. Had Davister brought its appeal in the Third, Sixth, or Ninth Circuits, the court would have applied *Pireno* and *Royal Drug* and considered the facts and circumstances of the specific dispute between Davister and United Republic. That inquiry can lead to only one result, as argued by Judge Lucero: Davister's contract dispute with United Republic over real property interests in Texas has no connection to the business of insurance in Utah. Like the alleged practice in *Merchants Home Delivery* and the conduct of the defendant bank in *Kenty*, Davister's contractual relationship with United Republic satisfies none of the *Pireno* factors: it involves no spreading or transfer of risk, there is no policy relationship between them, and the sale of stock is a practice not limited to the insurance industry. *See Pireno*, 458 U.S. at 129. As aptly described by Judge Lucero: "The contract to be interpreted is a real estate contract. . . . The deliberately narrow holding of *Fabe* forecloses a scope of reverse preemption so broad that it could encompass the arbitration of such a contract." (App. 16a.) For the foregoing reasons, Davister respectfully requests that this Court grant the writ to establish and clarify the proper role of the specific conduct at issue in analyzing the applicability of the McCarran-Ferguson Act.

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[7] Although the focus in *Rhode Island Insurers' Fund* was on whether the federal statute specifically related to the business of insurance under the first prong of section 1012(b), the court noted that "*Fabe* is apposite to the extent that 'business of insurance' is a term common to both the first and second prongs under § 1012(b)." 80 F.3d at 622 n.4.

III. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S OPINION IN *FABE*.

As described above, the Tenth Circuit concluded that the Utah statute "consolidating all claims against a liquidating insurer . . . was enacted to protect policyholders." (App.10a.) The Tenth Circuit further concluded that the stay provision "prevents conflicting rulings on claims, the unequal treatment of claimants, and the unnecessary and wasteful dissipation of the remaining funds of the insolvent insurer." (App. 11a.) On these grounds, the court determined that "the Utah statute meets the test of having been enacted for the purpose of regulating the business of insurance." (App. 11a.) In dissent, Judge Lucero noted that, although policyholders may be affected "by any claims on the assets of insolvent insurers by potential creditors," *Fabe* rejected such indirect benefits to policyholders as "pertaining to the 'business of insurance.'" (App. 14a.)

In *Fabe*, this Court clearly concluded that "the Ohio priority statute, *to the extent it regulates policyholders*, is a law enacted for the purpose of regulating the business of insurance." *Fabe*, 508 U.S. at 508 (emphasis added). To the extent that a state law "is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance." *Id.* at 508-09. This Court further concluded that indirect effects that "ultimately may redound to the benefit of policyholders" are simply not sufficient to pass the McCarran-Ferguson test. *Id.* This Court went on to determine that "preferences conferred upon employees and other general creditors . . . do not escape pre-emption because their connection to the ultimate aim of insurance is too tenuous." *Id.*

As recognized by Judge Lucero, although policyholders may be affected by creditors' claims on the assets of insolvent insurers, *Fabe* held that laws granting indirect benefits to policyholders do not regulate the business of insurance. (App. 15a.) Unlike the Ohio

statutes granting direct preferences to policyholders over other creditors and granting payment of administrative costs *necessary for the commencement of liquidation*, *see id.*, the Utah statute only indirectly benefits policyholders and is *not* necessary for the state to liquidate insolvent insurance companies. Because the Utah statute at issue is unlike the Ohio statutes given preemptive force in *Fabe*, the Tenth Circuit's opinion cannot be reconciled with *Fabe* and must be addressed and, ultimately, reversed by this Court.

IV. THE TENTH CIRCUIT'S REASONING AND RELIANCE ON THE *MUNICH* DECISION IS FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S DECISIONS REGARDING THE PURPOSE AND GOALS OF THE FEDERAL ARBITRATION ACT.

This Court has often recognized that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural law to the contrary." *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA was enacted to overrule longstanding judicial hostility toward arbitration and to encourage arbitration as a way to resolve disputes efficiently and quickly. *E.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Indeed, the hallmarks of arbitration are its "adaptability and access to expertise." *Mitsubishi Motors Corp. V. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). The proceedings are streamlined and the results are generally obtained expeditiously. *Id.* The typical reason parties choose arbitration is their desire to keep the effort and expense of resolving disputes manageable. *Id.* These goals are compatible with Utah's insurance liquidation statute.

The Tenth Circuit's suggestion that Davister is not "without a remedy" and that the liquidation court can order arbitration if it "is the best way to resolve the conflict," (App. 13a), is also inconsistent

with this Court's decision in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). In *Quackenbush*, this court held that, under *Burford*,[8] the federal court could not remand a dispute between a reinsurer and an insolvent California insurer to the state court. *Id.* at 731. As in this case, the reinsurer had moved the federal court to compel arbitration under the FAA. *Id.* at 728-29. California had placed the insurer into liquidation under the comprehensive liquidation act like Utah's. *See* Petitioner's Brief ("*Quackenbush* Br.") at 3-4, in *Quackenbush*, 517 U.S. 706. The liquidator claimed that the underlying proceedings were *in rem* or *quasi in rem*, and that by enacting the McCarran-Ferguson Act, Congress mandated that the insurance industry would be a "state enclave." *Quackenbush* Br. at 4.

In *Quackenbush*, the state court assumed "sole and exclusive" jurisdiction over all estate assets (including reinsurance recoverables), and enjoined all proceedings against the liquidator. *Quackenbush* Br. at 8-9 & n.19-20. Quackenbush argued that the states had the paramount interest in regulating the business of insurance under the McCarran-Ferguson Act, and remanding the petition would not put the reinsurers "out of court" because they could still pursue their arbitration claims in state court. *Quackenbush* Br. at 24-25.

This Court did not address Quackenbush's arguments regarding the McCarran-Ferguson Act directly, but it did address the significant federal policy embodied in the FAA, noting:

> [T]he federal interests in this case are pronounced, as [the reinsurer's] motion [against the liquidator of an insolvent insurer] to compel arbitration under the [FAA] implicates a substantial federal concern for the enforcement of arbitration agreements.

Quackenbush, 517 U.S. at 728-29. Further this Court implicitly

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[8] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

recognized that not all disputes involving insolvent insurance companies are matters of substantial state concern. *See id.* at 729. Finally, this Court rejected the liquidator's claim that a remand to the state court would not put the reinsurers out of court, stating that "out of court" meant out of federal court. *Id.* at 714. Like the reinsurers in *Quackenbush*, Davister should not be put out of federal court and relegated to the Utah state court to enforce their federal right to arbitrate.[9]

This case implicates the substantial federal policy favoring enforcement of arbitration agreements reflected in *Quackenbush* and this Court's other FAA decisions. The Tenth Circuit's decision, in the words of Judge Lucero, "bring[s] this dispute within the reach of McCarran-Ferguson reverse pre-emption" which "would swallow the very fine distinction set forth by *Fabe*'s majority, potentially precluding federal jurisdiction over **any** dispute involving an insolvent insurance company." (App. 17a, (emphasis added).) As such, the Tenth Circuit's decision runs in direct conflict with this Court's pronouncements regarding the FAA.

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[9]Davister's right to compel arbitration in federal court is more compelling than in either *Quackenbush* or *Munich* since it is "neither a policyholder of United Republic nor an insurer of United Republic's policies." As Judge Lucero noted, "[t]he contract to be interpreted is a real estate contract" that "has no connection to policy holders or their policies." (App. 16a.)

V. THE TENTH CIRCUIT'S DECISION IMPROPERLY DIVESTS DAVISTER OF A FORUM IN FEDERAL COURT, UNDER DIVERSITY JURISDICTION, TO PURSUE RIGHTS UNDER THE FEDERAL ARBITRATION ACT.

Review by this Court is also warranted because the Tenth Circuit ignores this Court's decisions that federal courts have a "virtually unflagging obligation" to exercise jurisdiction when a party seeks to compel arbitration.

Section 1332 provides, in relevant part, that "the district courts shall have original jurisdiction of all civil actions ... between -- (1) citizens of different States." *28 U.S.C. § 1332(a)(1).* The underlying purpose of diversity of citizenship legislation is to provide a separate forum for out-of-state citizens against state court bias. *Smith v. Metropolitan Property & Liability Ins. Co.*, 629 F.2d 757 (2nd Cir. 1980). Although the Tenth Circuit declined to consider the abstention doctrine in affirming the district court, it's ruling denies Davister a forum free from state court bias.

The Tenth Circuit judgment explicitly affirms the district courts ruling under the McCarran-Ferguson Act and "not under other doctrines of abstention." (App. 2a.) Considering this Court's longstanding line of cases, beginning with the *Burford* doctrine, it is understandable that the Court sought to fashion an affirmance around the McCarran-Ferguson Act and not the abstention doctrines relied upon by the Liquidator.

This Court has provided clear instruction on the issue of abstention in cases involving a petition for arbitration. *See, Moses H. Cone Mem'l Hosp.*, 460 U.S. 1. In *Moses H. Cone*, a dispute arose out of a construction contract containing an arbitration provision between a hospital and contractor. The hospital filed a state court action seeking a declaratory judgment that there was no right to arbitration. The contractor filed an action in federal district court

seeking an order compelling arbitration under section 4 of the FAA. The district court stayed the federal action pending resolution of the state court suit. The Fourth Circuit reversed with instructions to enter an order to arbitrate. This Court affirmed the order of the Fourth Circuit compelling arbitration.

Citing *Colorado River Water Conservancy District v. United States*, 424 U.S. 800 (1976), this Court examined the abstention doctrine and noted:

> Abstention from the exercise of federal jurisdiction is the exception not the rule. "The doctrine of abstention ... is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the **exceptional circumstances** where the order to repair to the state court would clearly serve an important countervailing interest."

Moses H. Cone, 460 U.S. at 15 (*quoting County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959) (emphasis added)). The "exceptional circumstances test" set forth in *Moses H. Cone* and *Colorado River* continues to be the test for application of the abstention doctrine. The abstention doctrine, therefore, must take into account the obligation of the federal courts to exercise jurisdiction with only the clearest of justifications warranting abstention. *Id.* at 15-17; *see also Colorado River*, 424 U.S. at 818-19.

The Tenth Circuit's exclusive reliance upon the McCarran-Ferguson Act, rather than the abstention doctrine, to affirm the district court's judgment implicitly demonstrates the court of appeals struggle with the abstention doctrine. And, for good reason -- the doctrine does not apply to the circumstances of this case and the

Tenth Circuit's judgment denies Davister a federal forum, free of state court bias, in which to air its dispute with the Liquidator of United Republic.

The Liquidator relied on three abstention doctrines: (1) the *Burford*; (2) the *Younger*;[10] and (3) the *Colorado River*. In 1943, the *Burford* abstention doctrine was enunciated by this Court. *Burford*, 319 U.S. 315. This Court held that federal courts should refrain from exercising authority over issues involving basic state policies pertaining to the regulation of important state issues, such as transportation, natural gas and eminent domain proceedings. *Grode*, 8 F.3d at 956.

In *Colorado River*, this Court enunciated a related doctrine allowing federal courts to abstain where the Congress had enacted legislation granting state court jurisdiction. *Colorado River*, 424 U.S. 800. This Court concluded that where federal legislation, together with other "exceptional circumstances"[11] are present, federal courts may "recognize the availability of comprehensive state systems for adjudication of water rights...." *Id.* at 819. No one factor is determinative and "only the clearest of justifications will warrant dismissal [of the federal action]." *Id.*

Finally, the *Younger* abstention doctrine grew out of the efforts of a criminal defendant to have a federal district court enjoin a county district attorney from prosecuting him. Interference by a

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[10] *Younger v. Harris*, 401 U.S. 37 (1971).

[11] Among the "exceptional circumstances" to be considered by a federal court are the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation and the order in which jurisdiction was obtained by the concurrent forums. *Colorado River*, 424 U.S. at 818-19. However, the district court's examination "does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case." *Moses H. Cone*, 460 U.S. at 416.

federal court was held to obstruct state efforts to operates its judicial system. *Younger v. Harris*, 401 U.S. 37. (1971). Although this doctrine was extended to civil proceedings which were more akin to a criminal prosecution, *Huffman v. Pursue*, 420 U.S. 592 (1975), its application in this case is of little import.

A review of the abstention doctrine, as enunciated by this Court, demonstrates why the Tenth Circuit skirted around it in affirming the district court. It is in the application of the abstention tests to the arbitration provision and facts of this case that highlights the Tenth Circuit's error. In *Grode*, the Third Circuit held as follows:

> Although the regulation of insolvent insurance companies is surely an important state interest, this case does not involve the complex and highly regulated issues of insurance regulations; rather it is a simple contract action involving an allegedly unpaid debt. The complex regulations relating to insolvent insurance companies have to do with plans of rehabilitation and payment to policyholders. Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests . . .. The federal court need not decide this case if the state has misapplied its authority, but rather, it must look only to the four corners of the treaties to determine if the arbitration is appropriate.

Grode, 8 F.3d at 959. *See also New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (Court held that abstention was not appropriate in a case where a complex state administrative process is not at issue).

Davister's foray into the United States District Court in Utah

was to compel arbitration of a simple contract dispute. This case does not involve "difficult questions of state law" or a matter of "substantial public concern." *Todd v. DSN Dealer Service Network, Inc.*, 861 F.Supp. 1531 (D. Kan. 1994). The abstention doctrine requires more than a desire to avoid every inconvenience to, or disruption of, a state's regulatory system. *Fragoso v. Lopez*, 991 F.2d 878, 885 (1st Cir. 1993). The Tenth Circuit's silence concerning the abstention doctrine stands in stark contrast to the overwhelming authority from this Court's decisional law that it should apply in only "exceptional circumstances." By this silence, Davister has been precluded from having its dispute resolved in a forum free of state court bias.

VI. IF NOT REVIEWED, THE TENTH CIRCUIT'S DECISION WILL CAUSE CONFUSION AND MISUNDERSTANDING IN THE LAW

Unless reviewed by this Court, the Tenth Circuit's decision will cause confusion and misunderstanding in the law regarding whether state procedural laws reverse preempt federal laws under the McCarran-Ferguson Act. The Tenth Circuit's decision creates confusion as to whether a federal law invalidates, impairs, or supersedes a state law for McCarran-Ferguson Act purposes, even if the federal and state laws achieve the same goal by different means. The decision also creates confusion as to whether a procedural law regulating the forum in which litigants can commence an action are laws regulating the "business of insurance." Unless reviewed, the decision will lead to confusion regarding whether a State can prohibit citizens of other states from commencing or maintaining actions in federal court against the state's domestic insurance companies and can instead require all such actions -- by residents and nonresidents alike – be brought in a state court in the insurance company's home state.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for the writ of certiorari.

Respectfully submitted

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APPENDIX

APPENDIX A

Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-CV-1007

DAVISTER CORPORATION,

Plaintiffs-Appellants,

versus

UNITED REPUBLIC LIFE INSURANCE COMPANY and ROBERT E. WILCOX, Utah Insurance Commissioner and Liquidator of United Republic Life Insurance Company,

Defendants-Appellees.

Appeal from the United States District Court for the District of Utah

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August 28, 1998

Mark R. Gaylord (Charles P. Sampson and Bruce T. Jones with him on the briefs) of Suitter Axland, Salt Lake City, Utah, for Plaintiff-Appellant.

John P. Harrington (Valerie A. Longmire with him on the brief) of Ray, Quinney & Nebeker, Salt Lake City, Utah, for Defendants-Appellees.

Before **PORFILIO, LUCERO,** and **MURPHY,** Circuit Judges.

PORFILIO, Circuit Judge.

This case considers whether the district court erred by abstaining from enforcing arbitration of a dispute between Davister Corporation and the Liquidator of United Republic Liquidator of United Republic Life Insurance Company (United), an insurance company domiciled in Utah and currently under liquidation in insolvency proceedings in Utah state court. We believe this question must be resolved under the McCarran-Ferguson Act, not under other doctrines of abstention. So focused, we hold the district court correctly refused to compel arbitration. We therefore affirm its judgment.

The facts of this matter are relatively simple. Prior to insolvency, United had entered into a transaction with Davister in which it agreed to transfer some of its stock to Davister in exchange for 100% of the stock of R.G. Acquisition Corporation (RGA). As part of that agreement, United was to obtain certain real property

interests in Waco, Texas, that were the principal assets of RGA. Subsequently, the Commissioner of the Utah Insurance Department notified United this and other similar transactions were improper and must cease. Moreover, the Commissioner advised United the transaction involving the stock of RGA "must be reversed" because United had not obtained required authorization from the commission to exchange its stock for the stock of RGA.

Before the reversal was accomplished, however, the Commissioner filed an action in Utah state court to seize control of the company. He also filed an action in Texas state court to gain control of the Waco real property interests. Davister intervened in the Texas action seeking rescission of its transaction with United, claiming the Utah Commissioner's order to reverse caused a failure of consideration in its agreement with United. Davister also sought a judgment establishing its right to the Texas property interests.

Meanwhile, in the Utah state court action, the Commissioner obtained an order liquidating United and appointing him the Liquidator. Contemporaneously the state court issued an order staying all claims against United. *See* Utah Code Ann. §31A-27-317 ("The filing of a petition for liquidation of a domestic insurer or of an alien insurer domiciled in this state stays all actions and all proceedings against the insurer..."). That stay was honored by the Texas court which also stayed all of Davister's claims pending in that forum, although the court permitted the continuation of the balance of the Texas action.

Davister then filed this case against United and the Commissioner (Defendants) in the United States District Court for the District of Utah to compel arbitration of the dispute over the Texas real property interests in accordance with the agreements between

Davister and United. In addition, Davister sought a stay of the entire Texas action and the Utah liquidation. After a hearing on the merits, the federal district court abstained from compelling arbitration and refused to grant the stay requested by Davister. Davister then brought this appeal.

On appeal, Davister argues clear national policy and the Federal Arbitration Act mandate arbitration in place of state litigation when the parties have contracted to submit disputes to arbitration, citing *Southland Corp. V. Keating,* 465 U.S. 1 (1984), and *Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp.,* 460 U.S. 1 (1983). Davister contends once a federal court determines a dispute exists between the parties which they have agreed to arbitrate, it must stay all other proceedings and compel arbitration. *Houlihan v. Offerman & Co.,* 31 F.3d. 692, 695 (8th Cir. 1994). Defendants respond that abstention was proper on grounds of comity, but if not on that basis, certainly under the McCarran-Ferguson Act. Defendants rely upon 15 U.S.C. §1012 which states: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," contending it trumps the federal policy favoring arbitration. Defendants also urge their position is supported by *United States v. Fabe,* 508 U.S. 491 (1993).

In *Fabe*, the Court was called upon to determine whether in an Ohio statutory procedure for the liquidation of an insolvent insurance company the United States was entitled to assert a priority claim granted it under a federal statute. "In order to resolve this case, we must decide whether a state statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law enacted 'for the purpose of regulating the business of insurance,' within the meaning of §2(b) of the McCarran-Ferguson

Act, 15 U.S.C. §1012(b)." *Fabe*, 508 U.S. at 493.[1]

The United States maintained the Ohio liquidation act could not have been enacted for the purpose of regulating the business of insurance because it merely determined the order in which claims of creditors would be paid. It also contended the statute did not deal with the insurer-insured relationship because it pertained only to resolution of conflicts between policyholders and other creditors of the insolvent insurance company.

The government grounded its argument on two cases, *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 (1982), and *S.E.C. v. National Sec., Inc.*, 393 U.S. 453 (1969). *Pireno* held there are three factors to be considered in determining what constitutes the business of insurance: 1) does the practice have the effect of transferring or spreading a policyholder's risk; 2) is the practice integral to the relationship of the insurer and the insured; 3) is the practice limited to entities within the insurance industry? *Pireno,* 458 U.S. at 129. *National Sec.* held: "Statutes aimed at protecting or regulating [the] relationship [between insured and insurer], directly or indirectly are laws regulating the 'business of insurance.'" *National Sec.*, 393 U.S. at 460.

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[1]The Court's analysis produced what we have come to call a three-part test for the determination of whether the McCarran-Ferguson Act should be applied: (1) does the federal statute at issue "specifically relate to the business of insurance"; (2) was the state statute enacted "for the purpose of regulating the business of insurance"; (3) would application of the federal statute "impair, interfere, or supersede" the state statute? *Fabe*, 508 U.S. at 500-01. Part (1) of the test is not an issue in this case because the Federal Arbitration Act does not specifically relate to the business of insurance.

The Court was unconvinced. Considering *Pireno* together with *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), both of which held McCarran-Ferguson inapplicable to "ancillary activities" within the insurance industry, *see Fabe*, 508 U.S. at 503, the Court concluded the business of insurance was most importantly involved with the "performance of an insurance contract." *Id.* At 503-05. The Court then explained:

> The broad category of laws enacted "for the purpose of regulating the business of insurance consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the "business of insurance."...[We believe that the actual performance of an insurance contract is an essential part of the "business of insurance." Because the Ohio statute is "aimed at protecting or regulating" the performance of an insurance contract, it follows that it is a law "enacted for the purpose of regulating the business of insurance" within the meaning of the first clause of §2(b) [15 U.S.C. §1012(b)].

Id. at 505 (citation omitted).

Although the government maintained the Ohio liquidation statute was a bankruptcy law and not an insurance statute, the Court disagreed. "The primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company

itself: the payment of claims made against policies." *Id.* At 505-06.[2]

Because *Fabe* dealt only with competing claims of priority of distribution in a liquidation setting, it does not completely inform our decision. We are called upon to go beyond that point to decide whether rights created under the Federal Arbitration Act must give way to a state court blanket stay in the liquidation setting. Our quest leads us to *Munich American Reinsurance Co. v. Crawford,* 141 F.2d 585 (5th Cir. 1998).

In that case, the Fifth Circuit was called upon to decide "whether state laws governing insurance company delinquency proceedings reverse pre-empt the [Federal Arbitration Act] under the McCarran-Ferguson Act." *Munich*, 141 F.3d at 587. The court held they did.

At issue in *Munich* was whether claims asserted by two reinsurers to certain policy proceeds arising out of reinsurance agreements between an insolvent Oklahoma insurance company and the claimants must be resolved by arbitration. The Oklahoma Insurance Commissioner, who was the liquidator of the insolvent company and holder of the proceeds, refused to submit to arbitration.

The claimants filed an action in federal district court to compel arbitration under the Federal Arbitration Act, and the district

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[2] Contrary to the position advanced in the dissent, we do not view ***Fabe*** to permit *all* actions arising under a state insurance liquidation statute to "automatically fall under the purview of the McCarran-Ferguson Act." As we have noted, a carefully constructed three-part test must be satisfied before the Act can apply. This examination must be implemented on a case-by-case basis, and the result will be dictated by the precise statutes involved in each case.

court granted relief. The Fifth Circuit reversed the judgment, stating:

> [T]he specific provisions of the statute at issue here-vesting exclusive original jurisdiction of delinquency proceedings in the Oklahoma state court ***and authorizing the court to enjoin any action interfering with the delinquency proceedings***-are laws enacted clearly for the purpose of regulating the business of insurance. These provisions give the state court the power to decide all issues relating to disposition of an insolvent insurance company's assets, including whether any given property is part of the insolvent estate in the first place.

Id. at 592-93 (emphasis added); see also *Murff v. Professional Med. Ins. Co.*, 97 F.3d. 289, 291 (8th Cir. 1996) ("We conclude that the Missouri statute purporting to stay all actions against an insolvent insurer is 'a law regulating the business of insurance.' It protects policyholders because it preserves the assets of the insolvent insurer's estate, thereby enhancing the ability of an insolvent insurance company to perform its contractual obligations.").

The court continued, quoting from *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 705 (10th Cir. 1988), "Oklahoma has not only adopted a comprehensive scheme to oversee liquidation of insolvent insurers, it has provided a particular court... to oversee liquidation proceedings." *Munich*, 141 F.3d at 593. This, the Fifth Circuit noted, is "a special relationship [which] contributes markedly to the orderly liquidation or rehabilitation of the insurance company and the adjudication of claims against it." *Id.* Moreover, giving the state court ultimate control over all issues relating to the insolvent insurance company is "aimed at protecting the relationship between

the insurance company and its policyholders." *Id.*

Dispatching the reinsurers' argument that the state law which consolidated disposition of all claims, including those of creditors other than policyholders, was not a law enacted for the purpose of regulating the business of insurance, the court turned to *Fabe*. The Fifth Circuit reminded that *Fabe* decided the Ohio law dealing with insolvency preferences for administrative expenses was "reasonably necessary" to the goal of protecting policyholders, hence, that law was enacted for the purpose of regulating the business of insurance. *Munich,* 141 F.3d at 593 (quoting *Fabe,* 508 U.S. at 509). The court applied the same reasoning to the Oklahoma liquidation proceedings in state court, holding that although some of the benefits from the liquidation could devolve upon non-policy holding creditors, none of those which inure to the benefit of policyholders "are insignificant or attenuated," and are "indistinguishable from the Ohio provision giving a preference to administrative expenses in Fabe," Thus, the court concluded, "these provisions were enacted for the purpose of regulating the business of insurance." *Id.* at 594.[3]

We hold the same result applies here. The Utah statute

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[3] The dissent overreads ***Munich***. The court did not in any way adopt a "per se rule of reverse preemption of federal enforcement of all arbitration agreements against an insurance company in insolvency proceedings." To the contrary, the Fifth Circuit carefully conducted the three-part ***Fabe*** test and concluded the Oklahoma law vesting exclusive jurisdiction in the state court and providing for a blanket stay of all other proceedings was "clearly for the purpose of regulating the business of insurance." ***Munich,*** 141 F.3d at 592-93. Nothing contained within the court's reasoning or inferable therefrom suggests the adoption of a per se test. More importantly, we purpose no such result ourselves.

consolidating all claims against a liquidating insurer, by its nature and express terms, was enacted to protect policyholders. *See* Utah Code Ann. §31A-27-101(2). By offering benefits to other creditors, that ultimate purpose is neither diminished nor denigrated. Adding to the stated statutory purpose is the statutory blanket stay against all proceedings against the insolvent insurance company.[4]

The stay makes clear it is the policy of the State of Utah to consolidate in one forum all matters attendant to the liquidation of a domiciled insurance company. That policy guarantees that the entire process is more than a simple liquidation of debt. Indeed, all decisions in Utah affecting the ultimate benefits to be accorded policyholders of a liquidated insurance company are circumscribed in one proceeding. Because the stay prevents conflicting rulings on claims, the unequal treatment of claimants, and the unnecessary and wasteful dissipation of the remaining funds of the insolvent insurer, the stay manifests a purpose of protecting policyholders. *Munich*, 141 F.3d at 593. We think it evident the Utah statute meets the test of having been enacted for the purpose of regulating the business of insurance.[5]

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[4] "The filing of a petition for liquidation of a domestic insurer or of an alien insurer domiciled in this state ***stays all actions and all proceedings*** against the insurer in Utah or elsewhere...." Utah Code Ann. §31A-27-317(a) (emphasis added).

[5] The dissent takes the position that the "facts before us are not related to the business of insurance as defined in ***Fabe***," citing in support of ***Garcia v. Island Program Designer, Inc.***, 4 F.3d 57, 62 (1st Cir. 1993). ***Garcia***, in fact makes the point we adopt. The federal statute in ***Garcia*** gave the United States a priority *in the state liquidation proceeding*. The law under which the liquidation was conducted would have deprived the federal government from

That decision leaves us with only the third part of the *Fabe* test, that is, whether, under the McCarran-Ferguson Act, the Federal Arbitration Act "invalidate[s], impair[s], or supercede[s]" §31A-27-317(a). Again, we believe the answer is obvious. Allowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue and force arbitration contrary to the blanket stay entered by the Utah state court would certainly impair the progress of the orderly resolution of all matters involving the insolvent company. Unquestionably, that result would directly impact the policyholders because it deals with a purported asset of the insurance company that could be apportioned to them. Recognition of that consequence makes apparent the conflict between the terms of the FAA and the Utah law. Neither *Fabe* nor any other authority holds that the applicability of the McCarran-Ferguson Act is dependant upon the existence of a Utah law "mandating against arbitration" as the dissent contends. With all due respect, that approach turns the *Fabe* test inside out. The issue is not whether Utah prohibits arbitration, but

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participating in the proceeds of liquidation until after all other claims had been satisfied. *Id.* At 61. Clearly, the Commonwealth statute prescribing the order in which claims were to be liquidated had nothing to do with the regulation of the business of insurance. Indeed, that statute would have applicability in any form of debt liquidation proceeding and it is not in any way peculiar to the business of insurance. In contrast, application of the federal statute here (having nothing to do with regulating the insurance business) would remove a dispute over a potentially significant piece of the liquidation proceeding (having by definition everything to do with regulating the insurance business) from the state court whose jurisdiction is exclusive and submit it for resolution by a non-judicial forum. That process would thoroughly denigrate Utah Code Ann. §31A-27-101(2), the state law enacted for the protection of policyholders. *Garcia* is simply inapposite.

whether enforcing arbitration invalidates, impairs, or supersedes the enforcement of the state process designed to protect the interest of policyholders. We agree wholeheartedly with the Fifth Circuit that "[r]egardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the receivership court nevertheless conflicts with [state] law giving the state court the power to enjoin any action interfering with the delinquency proceedings." *Munich*, 141 F.3d at 595.

Indeed, as the district court in this case cogently observed:

> I am just curious if we have... a state judge overseeing the liquidation, and you have... a stay order entered by him, and you're seeking some kind of relief in reference to either assets or claims of another kind against the company that is in receivership, ordinarily wouldn't you be over there in front of that state court judge saying, look, here is a problem, tell this receiver that you're overseeing to do something?

The district court, of course, was right.

Our resolution does not leave Davister without a remedy. Indeed, it can bring this matter before the liquidation court, and if arbitration is the best way to resolve the conflict, it can be ordered by that court under its own aegis. Moreover, if the stay is unfairly limiting Davister's pursuit of its rights in Texas, the Utah court can certainly grant relief from that stay as well. A federal court need not interfere in the process.

AFFIRMED.

96-4063, Davister v. United Republic Life Insurance Co.

LUCERO, Circuit Judge, dissenting.

Because I believe that the issue presented before us is governed by United States v. Fabe, 508 U.S. 491 (1993), and because my reading of that carefully limited opinion delivered by a divided Supreme Court precludes both the approach and result reached by the majority opinion, I respectfully dissent.

Unlike the majority, I do not understand Fabe to permit a conclusion that all actions arising under a state insurance liquidation statute automatically fall under the purview of the McCarran-Ferguson Act merely because of the operation of the state statute. Fabe's holding is much more nuance - requiring a close inquiry into whether the operation of each provision of the statute implicates the "business of insurance."

In Fabe, after reviewing relevant precedent, the Court concluded that a state statute "regulate[s] the business of insurance only to the extent that is protect[s] policyholders." Id. at 509 n.8. I recognize that the interests of policyholders are indirectly implicated by any claims on the assets of insolvent insurers by potential creditors. Emphasizing the "narrowness of our actual holding," id., however, the Fabe Court cautioned against defining all such indirect connections as pertaining to the "business of insurance" under McCarran-Ferguson. "This argument, however, goes too far: 'But in that sense, every business decision made by an insurance company has some impact on its reliability... and its status as a reliable insurer.' Royal Drug rejected the notion that such indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act." Id. at 508-509 (quoting Group Life & Health Ins.

Co. v. Royal Drug Co., 440 U.S. 205, 216-17 (1979)).

The facts before us are not related to the business of insurance as defined in Fabe. I disagree with the majority's adoption of Munich Amer. Reins. Co. v. Crawford, 141 F.3d 585 (5th Cir. 1998) to the extent that Munich imposes a per se rule of reverse preemption of federal enforcement of all arbitration agreements against an insurance company in insolvency proceedings. Fabe requires the examination of individual provisions of an insurance liquidation statute to determine which of those provisions specifically protect policyholders. See Fabe, 508 U.S. at 508-10 (finding reverse preemption of federal priority statute with respect to policyholders, but not with respect to other creditors); see also Garcia v. Island Program Designer, Inc., 4 F.3d 57, 62 (1st Cir. 1993) (Breyer, C.J.) (finding no reverse-preemption of filing-deadline provision of Puerto Rico insurance insolvency statute[1] because provision "cannot be said to directly 'regulate[] policyholders,' for it is neither directed at, nor necessary for, the protection of policyholders, as the [Fabe] Court required. The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors."). Like the provision at issue in Garcia, a blanket stay of all arbitration proceedings is of general benefit to all creditors and not specifically for the benefit of policyholders.

Nor is Munich clearly apposite on its facts to the situation before us. The Munich court considered the enforceability of arbitration clauses in reinsurance contracts which covered losses on claims paid under an insurance policy by the insolvent insurer, contracts which arguably relate with some directness to protecting

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[1] See L.P.R.A. tit. 26 (Insurance), ch. 40 (Rehabilitation and Liquidation).

policyholders. The precise question before the district court below, however, was whether to compel specific performance of the arbitration clause in a stock purchase agreement forming part of a real estate deal. Davister is neither a policyholder of United Republic nor an insurer of United Republic's policies. The contract to be interpreted is a real estate contract. Though an insurance company, albeit now insolvent, is a party, the contract has no connection to policyholders or their policies. The deliberately narrow holding of Fabe forecloses a scope of reverse preemption so broad that it could encompass the arbitration of such a contract.

Furthermore, this is not a case where the enforcement of the federal right would conflict with a specific provision of a state law precluding arbitration in insurance cases or insurance liquidation proceedings. Cf. Stephens v. American Int'l co., 66 F.3d 41, 44 (2d Cir. 1995) (concluding that specific antiarbitration provision in Kentucky insurance liquidation law precludes compelling arbitration under federal law); Mutual Reins. Bureau v. Great Plains Mut. Ins. Co., 969 F.2d 931, 933-34 (10th Cir. 1992) (holding that Kansas arbitration statute specifically exempting "contracts of insurance" was protected from FAA preemption by McCarran-Ferguson Act). Utah has no state law, either within or outside of its insurance liquidation scheme, mandating against arbitration in the insurance context. Thus, it is by no means clear that enforcement of the FAA would "invalidate, impair, or supersede" the Utah liquidation statute.

I am mindful that "the statutory question the majority considers with care is difficult." Fabe, 508 U.S. at 510 (Kennedy, J., dissenting). To bring this dispute within the reach of McCarran-Ferguson reverse pre-emption would swallow the very fine distinction set forth by Fabe's majority, potentially precluding federal jurisdiction over any dispute involving an insolvent insurance

company. Because I believe that the majority's result is neither contemplated by nor consistent with Fabe, nor required by McCarran-Ferguson, I would conclude that the federal court has jurisdiction over this dispute and would reach the question of whether the district court below properly abstained from exercising that jurisdiction.

APPENDIX B

January 4, 1996 Order of the United States District Court for the District of Utah

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN THE MATTER BETWEEN

DAVISTER CORPORATION,
Petitioner,

v. No. 95-CV-1007J

UNITED REPUBLIC LIFE INSURANCE COMPANY, and UTAH INSURANCE COMMISSIONER, ROBERT E. WILCOX, LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,
Respondents.

On December 7, 1995, the Petition for Order Compelling Arbitration and Stay came before the Court for hearing with Bruce T. Jones of Suitter, Axland & Hanson appearing on behalf of Petitioner Davister Corporation, and J. Ray Barrios, Assistant Attorney General, and John P. Harrington and Karl M. Anaya of Ray, Quinney & Nebeker appearing on behalf of Respondent United Republic Life Insurance Company, In Liquidation, and the Utah

Insurance Commissioner, Robert E. Wilcox, in his capacity as Liquidator. Based upon the pleadings and papers filed herein, the arguments of counsel, and being fully apprised of the circumstances herein and good cause otherwise appearing,

IT IS HEREBY ORDERED:

This Court shall abstain from compelling arbitration and shall not stay Cause No. 94-03032-E in the 101st Judicial District Court of Dallas County, Texas, Republic Life Insurance Company and Utah Insurance Commissioner, Robert E. Wilcox, Plaintiffs v. Carmel Realty Services, Ltd. Grapat Group, Inc. And Tara Group, Inc.

DATED this 4th day of January, 1996.

BY THE COURT:

/s/ Honorable Bruce S. Jenkins
Honorable Bruce S. Jenkins
U.S. District Court

APPROVED AS TO FORM:

/s/ Bruce T. Jones
Bruce T. Jones
Suitter, Axland & Hanson

/s/ John P. Harrington
John P. Harrington
Ray, Quinney & Nebeker

APPENDIX C

February 16, 1996 Order of the United States District Court for the District of Utah

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN THE MATTER BETWEEN

DAVISTER CORPORATION,
Petitioner,

v. 95-CV-1007J

UNITED REPUBLIC LIFE INSURANCE COMPANY, and UTAH INSURANCE COMMISSIONER, ROBERT E. WILCOX, LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,
Respondents.

On January 29, 1996, a status hearing was held before the Court before the Court with Bruce T. Jones of Suitter Axland & Hanson, and Thomas V. Murto, III of Madden and Nye, L.L.P., appearing on behalf of Petitioner Davister Corporation, and J. Ray Barrios, Assistant Attorney General, and John P. Harrington of Ray, Quinney & Nebeker appearing on behalf of Respondent United Republic Life Insurance Company, In Liquidation, and the Utah

Insurance Commissioner, Robert E. Wilcox, in his capacity as Liquidator. Based upon the pleadings and papers filed herein, the arguments of counsel, and being fully apprised of the circumstances herein and good cause otherwise appearing,

IT IS HEREBY ORDERED:

The Petition for Order Compelling Arbitration and Stay dated November 7, 1995 is dismissed without prejudice.

DATED this 16th day of February, 1996.

BY THE COURT:

/s/ Honorable Bruce S. Jenkins
Honorable Bruce S. Jenkins
U.S. District Court Judge

Approved as to form:

/s/ Bruce T. Jones
Bruce T. Jones
Suitter Axland & Hanson

/s/ John P. Harrington
John P. Harrington
Ray, Quinney & Nebeker

APPENDIX D

The Constitution of the United States

Article III

Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E

The Federal Arbitration Act,
9 U.S.C. Section 1, et. seq.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall

hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

APPENDIX F

The McCarran-Ferguson Act,
15 U.S.C. Section 1011, et seq.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1980, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX G

Diversity Jurisdiction
28 U.S.C. Section 1332

§ 1332. Diversity of Citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -

(1) citizens of different states;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in Section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

APPENDIX H

Insurers Rehabilitiation and Liquidation
Utah Code Ann. Section 31A-27-101, et seq.

31A-27-101. Scope, purpose, and construction.

(1) The proceedings authorized by this chapter may be applied to:

(a) all insurer and reinsurers who are doing, or have done, an insurance business in this state, and against whom claims arising from that business may exist how or in the future;

(b) all insurers who give the appearance of or claim they do an insurance business in this state;

(c) all insurers who have insured resident in this state; and

(d) all other persons organized or in the process of organizing to do an insurance business as an insurer in this state.

(2) The purpose of this chapter is the protection of the interests of insured, creditors, and the public generally, with minimum interference with the normal prerogatives of owners, through:

(a) early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures;

(b) improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

(c) enhances efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

(d) equitable apportionment of any unavoidable loss;

(e) lessening the problems of interstate rehabilitation and

liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope or personal jurisdiction over debtors of the insurer outside this state; and

(f) regulation of the insurance business by law relating to delinquency procedures and by substantive rules of the entire insurance business.

(3) This chapter shall be liberally construed to effect the purpose stated in Subsection (2). It does not limit the powers granted the commissioner by other provision of law.

APPENDIX I

31A-27-317. Actions by and against liquidator.

(1) The filing of a petition for liquidation of a domestic insurer or of an alien insurer domiciled in this state stays all actions and all proceedings against the insurer in Utah or elsewhere and the liquidator may not intervene in them, except as provided in this subsection. Whenever, in the liquidator's judgment, an action in Utah has proceeded to a point where fairness or convenience would be served by its continuation to judgment, the liquidator may apply to the court for leave to defend or to be substituted for the insurer, and if the court grants the application, the action is not stayed. Whenever in the liquidator's judgment, the protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside Utah, with approval of the court the liquidator may intervene in the action.

(2) Except as provided under Section 31A-27-323, filing a petition for liquidation stays the exercise of any right of set off against the insurer.

(3) The liquidator may, within two years subsequent to an order for liquidation for within any further time as applicable law permits, institute an action or proceeding on behalf of the estate of the insurer upon any cause of action against which the period of limitation fixed by applicable law had not expired at the time of the filing of the petition. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim or for filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in the proceeding or by applicable law, for taking any action, filing any claim or pleading, or doing any act, and where in any of these sections the period had not expired at the date of the

filing of the petition for liquidation, the liquidator may, for the benefit of the estate, take any action or do any act, required of or permitted to the insurer, within a period of 180 days subsequent to the entry of an order for liquidation, or within any further period as is permitted by the agreement, in the proceeding, or by applicable law, or within any further time period as is shown to the satisfaction of the court not to be unfairly prejudicial to the other party.

(4) No statute of limitations runs and no defense of laches is available with respect to any action against an insurer between the filing of a petition for liquidation and the denial of the petition. Any action against the insurer that might have been commenced when the petition was filed may be commenced for at least 60 days after the petition is denied.

(5) Any guaranty fund or association that may become liable as a result of the liquidation of an insurer may intervene in any court proceeding concerning the liquidation of the insurer.

FILED
JAN 25 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-875

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVISTER CORPORATION,

Petitioner,

vs.

UNITED REPUBLIC LIFE INSURANCE COMPANY AND ROBERT E. WILCOX, UTAH INSURANCE COMMISSIONER AND LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Utah state law that grants exclusive jurisdiction to a Utah state court over all actions and proceedings against an insolvent insurance company reverse preempts the Federal Arbitration Act by the operation of the McCarran-Ferguson Act.

STATEMENT PURSUANT TO RULE 29.6

Professional Investors Insurance Group, Inc. is the parent company of Respondent United Republic Life Insurance Company; however, Professional Investors Insurance Group, Inc. is not the exclusive owner of United Republic Life Insurance Company shares. Other shareholders of United Republic Life Insurance Company include Petitioner Davister Corporation. United Funeral Services, Inc. is a nonwholly owned subsidiary of United Republic Life Insurance Company.

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Respondent respectfully requests that the Court deny the petition for a writ of certiorari ("Petition") to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for the District of Utah entered an Order dated January 4, 1996, abstaining from compelling arbitration. (Pet. App. B.) The United States District Court for the District of Utah entered an Order dated February 16, 1996 dismissing without prejudice the Petition for Order Compelling Arbitration and Stay. (Pet. App. C.) The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 152 F.3d 1277. (Pet. App. A.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those listed by Petitioner, the following statutes are involved in this case. Utah Code Ann. § 31A-5-305 (1998). These statutes are set forth in full in Respondents' Appendix, attached hereto. References to Respondents' Appendix shall be in the form, "Resp. App. __."

STATEMENT OF THE CASE

A. Proceedings Before the District Court

In December of 1992, Respondent, United Republic Life Insurance Company ("United Republic") purchased from Petitioner, Davister Corporation ("Davister"), all of the outstanding and issued shares of R.G. Acquisition Corporation ("RGA") which were exclusively owned by Davister. Pursuant to the Stock Purchase Agreement dated December 23, 1992

("Stock Purchase Agreement"), United Republic agreed to transfer 3,027,000 shares of United Republic Series B stock to Davister in exchange for the total ownership of all RGA stock.

The issuance of the Series B stock of United Republic to Davister was not approved by the Utah Insurance Department as required by Utah Code Ann. § 31A-5-305 (1998). (Resp. App. A.) On March 23, 1993, the Utah Insurance Department informed United Republic that its failure to obtain the approval of the Utah Insurance Department for the issuance of stock and debentures (including the stock involved in the RGA transaction) would necessitate the reversal of the transactions and the accounting for those transactions until approval for the stock issuance had been granted. (Resp. App. B.)

On September 29, 1993, Respondent, Robert E. Wilcox ("Wilcox") filed the Verified Petition for Seizure Order with the Utah state district court seeking permission to take control and possession of all United Republic property. On September 29, 1993, the Utah state district court granted Respondent Wilcox's petition thereby giving him possession and control of all United Republic property.

On March 29, 1994, Respondent Wilcox filed an Original Petition and Application for Injunctive Relief in the Texas state court (the "Texas Action"), seeking to gain control of the properties located in Texas. Davister intervened in the Texas Action on April 14, 1994, seeking the rescission of the Stock Purchase Agreement on the basis that the unapproved stock and debentures issued by United Republic constituted a failure of consideration that rendered the transactions void. More specifically, Davister's argument called into question the effect of the Utah Insurance Department regulation of stock issued by insurance companies.

On April 18, 1994, Respondent Wilcox filed in the Utah state court a Verified Petition for Liquidation Order ("Liquidation Petition") which stayed all actions against United Republic including Davister's claims for rescission in the Texas Action. On November 18, 1994, the Utah state court entered a Liquidation Order that provided, *inter alia*, that all actions against United Republic were stayed indefinitely, and appointed Respondent Wilcox the Liquidator of United Republic. On July 24, 1995, Davister filed a Proof of Claim against the liquidation estate of United Republic wherein Davister once again sought rescission of the Stock Purchase Agreement.

Almost one year after the entry of the Liquidation Order, Davister filed its Petition for Order Compelling Arbitration and Stay in the United States District Court for the District of Utah seeking to enforce an arbitration provision in the Stock Purchase Agreement. The district court declined to order arbitration and abstained from taking jurisdiction of the dispute. (Pet. App. B.) Subsequently, the district court entered its Order dated February 16, 1996, dismissing the dispute without prejudice. (Pet. App. C.) Rather than requesting the Utah state court in charge of United Republic's liquidation proceedings to compel arbitration, Davister chose to appeal to the United States Court of Appeals for the Tenth Circuit.

B. The Decision of the United States Court of Appeals for the Tenth Circuit

Applying the three-part test set forth by this Court in *United States v. Fabe*, 508 U.S. 491 (1993), the Tenth Circuit upheld the Utah federal district court's decision not to compel arbitration of the dispute between Davister and United Republic. The Tenth Circuit began by stating that its decision must be guided by the McCarran-Ferguson Act, not by doctrines of abstention. The Tenth Circuit faithfully applied this Court's

reasoning in *Fabe* and considered if the FAA "must give way to a state court blanket stay in the liquidation setting" in light of the McCarran-Ferguson Act. (Pet. App. A at 7a.) The Tenth Circuit found guidance in the Fifth Circuit's decision in *Munich-American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998). In *Munich-American*, the Fifth Circuit held that state laws granting exclusive jurisdiction to state courts in insurance insolvency matters were laws clearly enacted for the purpose of regulating the business of insurance. *See id.* at 592-93.

The Tenth Circuit stated that the logic of *Munich-American* should apply to the facts before it and that Utah's statutory provisions that stay all actions and proceedings against the insurer in Utah or elsewhere reverse preempt the FAA under *Fabe*. (Pet. App. A at 7a.)

> Because the stay prevents conflicting rulings on claims, the unequal treatment of claimants, and the unnecessary and wasteful dissipation of the remaining funds of the insolvent insurer, the stay manifests a purpose of protecting policyholders.

(Pet. App. A at 10a.)

The majority focused on the state statute itself, not on the underlying dispute brought by the litigants. In closing, the Tenth Circuit noted that Davister would still have a remedy in the Utah state liquidation court because that court could easily order arbitration or allow the stay to be lifted with respect to the Texas Action. (Pet. App. A at 12a.)

In the dissenting opinion, Judge Lucero asserted that the majority opinion had created "a per se rule of reverse preemption of federal enforcement of all arbitration agreements" in an insolvency proceeding in state court. (Pet. App. A at 14a.)

Specifically, the dissent argued that the majority incorrectly used the second prong of the *Fabe* test, *i.e.*, was the state statute enacted for the purpose of regulating the business of insurance. Judge Lucero stated that the dispute between Davister and United Republic concerned a real estate contract that had no connection to policyholders or their policies. (Pet. App. A at 15a.) Finally, Judge Lucero stated that the federal statute compelling arbitration would not conflict with the Utah liquidation court stay provisions because "Utah has no state law, either within or outside of its insurance liquidation scheme, mandating against arbitration in the insurance context." (Pet. App. A at 15a.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE TENTH CIRCUIT AND THE DECISIONS OF OTHER CIRCUITS.

A. The Second, Tenth and Fifth Circuit Courts of Appeal Are Consistent with *Fabe*.

There is no compelling reason to grant the petition for writ of certiorari. The Court considered and denied a similar petition for writ of certiorari on virtually the same question in a case involving similar facts, statutes, and arguments as the instant case earlier this term. *See Munich-American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *cert. denied, American Reinsurance Co. v. NAC Reinsurance Corp. v. Crawford*, 67 U.S.L.W. 3361 U.S. (November 30, 1998).

In *Munich-American*, a creditor-reinsurer sued the liquidator of an insolvent insurance company over the payment of money.

See 141 F.3d at 587. The creditor-reinsurer, relying on the FAA, sought to enforce an arbitration provision in a contract with Employer's National Insurance Company ("ENIC"). *See id.* The Oklahoma Insurance Commissioner and liquidator of ENIC would not submit to arbitration. *See id.*

The Fifth Circuit upheld the dismissal of petitioner's motion to compel arbitration holding that the state insurance liquidation act reverse preempted the FAA. *See id.* In a careful and judicious application of the principles set forth in *Fabe* and in *Securities and Exchange Comm'n v. Nat'l Securities, Inc.*, 393 U.S. 453, 460 (1969), the Fifth Circuit held that the state insurance regulations at issue were enacted for the purpose of regulating the "business of insurance." *Munich-American*, 141 F.3d at 594. These state law provisions consolidated all claims against the limited assets of the insolvent insurer in one court and prevented the waste of estate funds that necessarily would occur if the liquidator was forced to defend different suits brought by different claimants in different forums across the county. *See id.* at 593-94. The stay provisions also eliminated the risk of piecemeal litigation and the unequal treatment of claims. *See id.* at 592-93. The court held that statutes that: (i) granted the state court exclusive original jurisdiction of insurance company liquidation proceedings; and (ii) allowed the state court to issue injunctions to enforce its exclusive jurisdiction, were "reasonably necessary" to advance the goal of protecting policyholders. *See id.* at 592-94.[1]

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1. The Fifth Circuit also properly applied *Fabe* on the issue of the meaning of "invalidate, impair, and supersede." Holding that the state's insurance liquidation law granted the state court broad powers to prevent interference with the liquidator including the power to enjoin any proceeding interfering with the liquidator's delinquency proceedings. *Munich-American*, 141 F.3d at 595-96. However, the proper interpretation of this prong was resolved in this Court's recent decision in *Humana, Inc. v. Forsyth*, __ U.S.__, 1999 WL 17679 (U.S. January 20, 1999).

As stated earlier, the creditor-reinsurer in *Munich-American* filed a petition for a writ of certiorari with this Court which was denied. Petitioner herein has asserted virtually the same issue and alleged the same conflicts as did the petitioner in *Munich-American*. In light of this, the instant Petition should also be denied.

B. There is No Conflict With the First, Third, Eighth and Ninth Circuit Courts of Appeal and the Second, Fifth and Tenth Circuits.

There is no conflict among the circuit courts of appeal raised by the decision of this case. The alleged conflicts actually turn on questions of fact or *dicta* that effectively distinguish one court's analysis from another's, not on different interpretations of the same law applied in the same factual setting.[2] Indeed, closer analysis of the alleged conflicts reveals that the circuit courts of appeal have uniformly recognized that under similar facts they would reach conclusions similar to the Tenth Circuit's in *Davister*.[3]

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2. In *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995), the Second Circuit held that the FAA could not be used to compel arbitration of a suit against reinsurers. However, unlike the other cases, the state statute at issue in *Stephens* contained an express anti-arbitration provision. This state law provision has been repealed by Kentucky (*Ky. Rev. Stat. Ann.* § 304.33-010(6) (Banks-Baldwin 1996)) thereby resolving the *Stephens* question. As a result, *Stephens* has limited applicability in the present case because the Second Circuit has not ruled in the context of a state insurance liquidation law that does not include an express anti-arbitration clause.

3. Petitioner cites to conflicts in the following cases that involve the McCarran-Ferguson Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*: *Doe v. Norwest*

(Cont'd)

Petitioner cites to *Garcia v. Island Program Designer*, 4 F.3d 57 (1st Cir. 1993) ("*Garcia I*"), for the proposition that the First Circuit conflicts with the Tenth Circuit's interpretation of the "business of insurance" discussion in *Davister*. (Pet. at 11.) Petitioner's reliance on *Garcia I* is misplaced. *See Garcia v. Island Program Designer, Inc.*, 875 F. Supp. 940 (D. Puerto Rico 1994) ("*Garcia II*"), *aff'd*, *Garcia v. Island Program Designer, Inc.*, No. 95-1006, 1995 WL 469461, at *1 (1st Cir. 1995) (unpublished) ("*Garcia III*") (Resp. App. C.) First, the *Garcia* cases do not involve the FAA. Second, those cases involved an insolvent health maintenance organization ("HMO"), not an insolvent insurance company, an important distinction expressly acknowledged by the district court on remand in *Garcia II*.[4] Accordingly, contrary to Petitioner's assertions, the First Circuit has not rendered a ruling on the same matter, facts or the statutes at issue in the Petition.

(Cont'd)

Bank Minnesota, N.A., 107 F.3d 1297 (8th Cir. 1997); *Kenty v. BankOne, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996); *Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996); and *Merchants Home Delivery Service, Inc. v. Frank B Hall & Co., Inc.*, 50 F.3d 1486 (9th Cir. 1995), *cert. denied, Prometheus Funding Corp. v. Merchants Home Delivery Service, Inc.*, 516 U.S. 964 (1995). These conflicts were resolved by this Court in *Humana, Inc. v. Forsyth*, argued before the Court on November 30, 1998, and decided by this Court on January 20, 1999. *Humana*, 1999 WL 17679, at *7. A similar petition to that filed in *Humana* also was submitted on June 29, 1998, in a case extensively relied upon by Petitioner called *Sabo v. Metropolitan Life Insurance Co.*, 137 F.3d 185, 193 (3rd Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3024 (U.S. June 29, 1998). In light of this Court's decision in *Humana* which resolves the conflicts discussed in the Petition, and in light of the pending petition before this Court in *Sabo*, it is not necessary for this Court to grant the Petition.

4. Petitioner concedes in footnote 6 of their Petition that *Garcia* did not involve the FAA. (Pet. at n.6.) Thus, *Garcia I* is not persuasive authority in the instant case.

The *Garcia* line of cases involved appeals of the district court's decision with respect to two separate preemption issues. In *Garcia I*, the First Circuit considered whether the McCarran-Ferguson Act applied to a dispute between the Internal Revenue Service ("IRS") and the liquidator of an insolvent HMO or whether ordinary federal preemption principles applied. *See* 4 F.3d at 57. The insurance liquidator argued that the federal statute giving the IRS's late-filed claim a first priority was reverse preempted by a Puerto Rican insurance company liquidation statute's filing-deadline provision. *See id.* at 58-62. Applying *Fabe*, the First Circuit held that the McCarran-Ferguson Act did not apply to the case before it because a filing deadline provision was deemed unnecessary for a liquidation and thus, was not "reasonably necessary to further the goal of protecting policyholders." *Garcia I*, 4 F.3d at 61-62. The Court reasoned that without such a filing deadline, liquidation would still occur. The court then applied ordinary preemption principles. *See id.* at 62.

On remand, the liquidator next argued that the McCarran-Ferguson Act reverse preempted the federal priority statutes for the claims of health care providers in the liquidation of an HMO. *See Garcia II*, 875 F. Supp. at 942. Citing *Fabe*, the liquidator argued that the state's priority scheme "involve[d] the regulation of the business of insurance and [was] designed to regulate, protect, or advance the interests of policyholders." *Garcia II*, 875 F. Supp. at 942-43. The district court disagreed, holding that the

> claims of health care providers in the liquidation of an HMO are [not] sufficiently like those of policyholders in the liquidation of an insurance company. . . . The relationship between an insurance company and an insured is not equal to the

> relationship between an insurance company and a health care provider.

Id. at 944.

On appeal for the second time, the liquidator asked the First Circuit to reverse the district court's ruling that the McCarran-Ferguson Act was not applicable to cases involving HMOs. *Garcia III*, 1995 WL 469461, at *1. The First Circuit refused to do so. *See id.* Thus, the conflict asserted by Petitioner is nonexistent.

Petitioner also discussed the alleged conflict with the Ninth Circuit's ruling in the pre-*Fabe* case of *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992). In *Bennett*, an insurance liquidator sought to enforce contractual rights against a creditor under a reinsurance agreement. *See id.* at 970. Petitioner is correct that the Ninth Circuit did enforce the arbitration clause invoked by the creditor under the FAA. *See id.* at 971. However, the *Bennett* court recognized that its decision to require arbitration was contrary to the decision reached by the Sixth Circuit Court of Appeals in *Fabe*, and that certiorari had been granted in that case. *See Bennett*, 968 F.2d at 973. Given that the court of appeal's ruling in *Fabe* was later upheld in relevant part by this Court, no actual conflict could exist unless and until the Ninth Circuit reconsiders *Bennett* in light of *Fabe*.

Reliance on any alleged conflict in *Bennett* also is misplaced in light of the recent Ninth Circuit case, *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372 (9th Cir. 1997) ("*Quackenbush II*").[5] In *Quackenbush II*, a state insurance

---

5. Petitioner has failed to cite the Ninth Circuit's ruling in *Quackenbush II* in its Petition.

liquidator of an insolvent insurance company, Mission Insurance Company, sought to enforce his contractual rights to recover payments under a reinsurance agreement Mission had with a creditor, Allstate Insurance Company. Allstate sought to invoke a contractual arbitration provision under the FAA.[6] *See id.* at 1375-76.

While ultimately holding that the liquidator's suit against the reinsurer-creditor was subject to the FAA (under facts similar to those in *Bennett*), the Ninth Circuit expressly distinguished its holding from cases involving suits by a creditor against the liquidator as in the *Davister* case. The Ninth Circuit made it clear that in circumstances involving a suit by a creditor against an insurance liquidator, it would hold that the McCarran-Ferguson Act would preempt the FAA. The Ninth Circuit stated:

> Under *Fabe*, there is no question that California's insurer-insolvency provisions regulate the "business of insurance" and are saved from preemption by the McCarran-Ferguson Act. *Thus, Allstate could not invoke the FAA to compel arbitration of its claims against Mission, which must be pursued through California's statutory insolvency scheme.*

Quackenbush II, 121 F.3d at 1381 (emphasis added). Thus, the Ninth Circuit stated in clear and unquestionable terms that it would hold in accord with the reasoning of the Tenth Circuit court under facts similar to those in the *Davister* case.

Petitioner's reliance on the Third Circuit's decision in *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 8 F.3d

6. The *Quackenbush II* court also considered the additional issue of whether a district court is prohibited from enjoining a state court litigation under the Anti-Injunction Act. *Quackenbush II*, 121 F.3d at 1376-1379.

953 (3rd Cir. 1993), also is misplaced. As in *Bennett* and *Quackenbush II*, an insurance liquidator brought an action against reinsurers based on a reinsurance contract. *See Grode*, 8 F.3d at 955. While *Grode* is at its core an abstention case, the liquidator argued that the court should also look to the McCarran-Ferguson Act. *See id.* at 958. The court expressly stated that the issue before it was "simply whether the district court improperly surrendered federal jurisdiction" and that it would not determine whether arbitration should have been compelled under the FAA. *Id.* at 955. The court's cursory discussion of the McCarran-Ferguson Act is dicta, which stated that the McCarran-Ferguson Act was "totally irrelevant," because this Court's ruling in *Fabe* was fundamentally inapplicable to the issues and facts before the *Grode* court. *Id.* at 960. The court stated that

> [i]n the instant case, however, there is no issue as to priority of any claim in the distribution of Mutual's assets or as to whether Pennsylvania's statute regulates the insurance industry.

Id.

Moreover, in *Grode* the Third Circuit also recognized that its analysis of the case before it would be different if it involved a suit by a creditor against the insurance liquidator. *See id.* at 959-60. The court expressly recognized that the state's interest in an orderly liquidation of assets in a single liquidation forum would be different in a suit by a creditor against the liquidator. It stated:

> In other words, courts abstain in suits against insolvent insurance companies for the same reasons that district courts refer bankruptcy cases to the bankruptcy court: Insurance companies tend to issue identical policies to a large number of people,

> rendering a single forum necessary to dispose equitably of the company's limited assets so as to avoid a race to the courthouse.
>
> The insolvent insurance company, Mutual Fire, is the plaintiff, not the defendant. As a result, there is not a large number of similarly situated plaintiffs competing for a limited amount of money. The insolvent insurer in liquidation is not called upon to dissipate its funds *defending* unconnected suits across the country. Rather, the insurance company is the only plaintiff and the defendants are not insolvent. Thus, this case is distinguishable from those in which the insolvent insurance company is the defendant, and there is no important state interest here involved to warrant abstention.

Id. at 960 (internal citations omitted). Thus, *Grode* does not support Petitioner's assertions.

Another case cited in the Petition — but for a different proposition — also supports the Tenth and Fifth Circuit's application of the "business of insurance" prong of *Fabe*. The Eighth Circuit in *Murff v. Professional Medical Insurance Co.*, 97 F.3d 289 (8th Cir. 1996), found that the provision staying all actions against an insolvent insurance company in a state insurance company insolvency act was enacted for the purpose of regulating the "business of insurance." *See id.* at 291. The *Murff* court stated that such a statute

> protects policyholders because it preserves the assets of the insolvent insurer's estate, thereby enhancing the ability of an insolvent insurance company to perform its contractual obligations.

Id.

Petitioner further contends that there are conflicts between the circuit courts on the question of the "business of insurance" prong set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982). Arguably, a few courts have noted a willingness to examine the conduct of the parties but ultimately these courts apply the same three-step *Pireno* test as did the Tenth Circuit.

For example, the Sixth Circuit's ruling in *Kenty v. BankOne, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996), a RICO case, is not in conflict with the three-prong test applied by other courts. In *Kenty*, the court's language regarding conduct is a mere statement of the nature of the analysis undertaken by the court. The court specifically stated:

> [T]he initial questions here are (1) whether the conduct by the insurance company in this case constitutes the business of insurance, and (2) whether it is regulated by Ohio insurance law. In *Union Labor Life Ins. Co. v. Pireno* . . . the Supreme Court set out *three factors* that determine when a company is engaging in the business of insurance for the purposes of the McCarran-Ferguson Act to apply: the practice must (1) have the effect of transferring or spreading a policyholder's risk; (2) be an integral part of the policy relationship between the insurer and the insured; and (3) be limited to entities within the insurance industry.

Id. at 391 (emphasis added) (internal citation omitted). The court then proceeded to apply the three factors as set forth in *Pireno* without reliance on a fourth "conduct" based test as asserted by Petitioner. *See id.*

Finally, the Ninth Circuit in *Merchants Home Delivery Service, Inc. v. Frank B Hall & Co., Inc.*, 50 F.3d 1486 (9th

Cir. 1995), another RICO case, relied on a McCarran-Ferguson Act test set forth in a pre-*Fabe* case, *Cochran v. Paco*, 606 F.2d 460, 464 (9th Cir. 1979). *Cochran* applied none of the *Pireno* factors adopted by this Court in *Fabe*. Moreover, its reasoning is not based on this Court's precedents in *Fabe* or *Pireno*. In sum, there are no conflicts among the circuits on the same matter, and therefore, the Petition should be denied.

C. There Is No Conflict Between The Circuit Courts Of Appeal On The Impair, Invalidate And Supersede Prong In *Fabe*.

Petitioner's argument that there is a conflict between the circuit courts of appeal on the "impair, invalidate, and supersede" clause of *Fabe* is unpersuasive for two reasons. First, this Court has set forth a new formulation for this prong of the *Fabe* test in *Humana v. Forsyth*, 1999 WL 17679, at *7. In light of this decision, any conflicts on this prong of the *Fabe* test have been resolved.[7]

Second, the alleged conflicts in *Grode* and *Murff* are illusory. Petitioner's argument that *Grode* stands for the proposition that "the First [sic] Circuit held that arbitration would have 'no negative effect on the state's regulatory scheme' " relies on the court's abstention analysis, not the McCarran-Ferguson Act.[8] (Pet. at 14.) Moreover, as noted

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7. As noted above, the RICO cases cited by Petitioner as evidence of conflicts on the proper interpretation of this prong of the *Fabe* test were resolved by this Court in the *Humana* decision.

8. Petitioner misstates the holdings of *Kenty v. BankOne, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996), and *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997). (*See* Pet. at 15.) Contrary to Petitioner's arguments, these cases do not stand for the proposition that there is a conflict on whether the impairment analysis under the

(Cont'd)

above, the Third Circuit in *Grode* expressly acknowledged that the McCarran-Ferguson Act was inapplicable to the facts and issues before it and that its reasoning would change in a case involving a suit by a liquidator against a creditor. *See Grode*, 8 F.3d at 960. Similarly, *Murff* does not discuss the FAA but the Age Discrimination in Employment Act. Thus, there is no conflict with the Tenth and Fifth Circuits.

(Cont'd)

McCarran-Ferguson Act applies only to substantive provisions of state law but not to procedural provisions. (Pet. at 8 and 15.) Petitioner misquotes the statement and reasoning of the *Kenty* court. (Pet. at 15.) The complete quotation of the *Kenty* court is:

> [*Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995)] stands for the proposition that McCarran-Ferguson protects the substantive measures embodied in state law. A party seeking to invoke McCarran-Ferguson *cannot simply point to additional procedural measures included in a federal law without identifying some substantive aspect of the state law that is being invalidated, impaired or superseded.* Thus, as the plain language of the statute suggests, this is fundamentally a question of what effect RICO has on the state law.
>
> In this case, Transamerica has pointed to several substantive sections of the Ohio Revised Code that would be either impaired or superseded by application of RICO.

Kenty, 92 F.3d at 392 (emphasis added) (internal citation omitted). Thus, the *Kenty* case neither limits the McCarran-Ferguson Act to substantive provisions of state law nor requires a party seeking McCarran-Ferguson Act preemption to identify a **substantive** (but not a procedural) provision of **state law** that will be impaired, invalidated or superseded as argued by Petitioner. Instead, *Kenty* simply states that a party cannot cite to procedural measures in **federal law** in an effort to argue impairment without specifically identifying state law provisions that will be impaired. Similarly, the Eighth Circuit in *Doe* does not make the procedural versus substantive distinction. *Doe*, 107 F.3d at 1297.

II.

THE TENTH CIRCUIT PROPERLY DECIDED THIS CASE IN ACCORDANCE WITH THE SUPREME COURT'S REASONING IN *FABE*.

The Tenth Circuit's decision in *Davister* is consistent with this Court's reasoning in *Fabe*. *Fabe* sets forth a three-part test for determining if the McCarran-Ferguson Act should be applied: (1) does the federal statute at issue [*i.e.*, the FAA] "specifically relate to the business of insurance"; (2) was the state statute enacted "for the purpose of regulating the business of insurance"; (3) would application of the federal statute "impair, invalidate, or supersede" the state statute. *See Fabe*, 508 U.S. at 500-01; *Humana*, 1999 WL 17679 at *7.

With respect to the second criterion,[9] the Tenth Circuit cited *Fabe* for its conclusion that "the actual performance of an insurance contract is an essential part of the business of insurance." *Fabe*, 508 U.S. at 503-05.

> The primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies.

Id. at 505.

The Tenth Circuit emphasized that its interpretation of *Fabe* did not mean that all actions arising under a state insurance liquidation statute would automatically fall under the reverse preemption of the McCarran-Ferguson Act. Rather, the potential impact of the McCarran-Ferguson Act should be determined

9. The first part of the test is satisfied because the FAA does not specifically relate to the business of insurance.

by a case-by-case analysis of the precise statutes involved.[10] (Pet. App. A at 7a.)

The Tenth Circuit's reasoning does not conflict with *Fabe*'s assessment of state insurance insolvency laws enacted for the purpose of regulating the business of insurance which reverse preempt federal law. A state insurance insolvency law affects the "business of insurance" to the extent the statute regulates policyholders. *See Fabe*, 508 U.S. at 508. The consolidation of all legal proceedings in an exclusive state court directly affects policyholders by providing a centralized forum in which the policyholders' claims will be adjudicated. The mere fact that the Utah statute affects other creditors (by requiring creditors' claims to be brought before the same state court) does not diminish or denigrate the direct impact on policyholders. This impact on policyholders is not remote, attenuated or derivative. Unquestionably, the *Davister* opinion comports with the standards announced by this Court in deciding whether the statute regulates the business of insurance.

With respect to the third criterion of *Fabe*, the Tenth Circuit decided that arbitration in a court other than the state liquidation court would "impair the progress of the orderly resolution of all matters involving the insolvent company." (Pet. App. A at 11a.) Although the *Davister* opinion was written before this Court's *Humana* decision, the Tenth Circuit's ruling is in total agreement with the *Humana* test to determine if a federal law would "impair" the state statute. When a federal law would frustrate any declared state policy or interfere with a state's administrative regime, the

10. *Fabe* does not mandate an inquiry into the underlying dispute; but if it did, Judge Lucero should have examined the essential dispute between Davister and United Republic which involved the effect of United Republic not having its stock approved by the Utah Insurance Department. Certainly, the Utah Insurance Department's regulation of stock issued by insurance companies is a statutory scheme enacted to regulate the business of insurance.

McCarran-Ferguson Act precludes the application of the federal law. *Humana*, 1999 WL 17679, at *6. The Tenth Circuit focused on the disruption that the FAA would have on the Utah administrative regime when it ruled that the FAA would impair the state insurance insolvency scheme:

> Allowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue and force arbitration contrary to the blanket stay entered by the Utah state court would certainly impair the progress of the orderly resolution of all matters involving the insolvent company.

(Pet App. A at 11a.) Therefore, the Tenth Circuit decision is fully compatible with the most recent decision of this Court concerning the third component of the *Fabe* test.

The Tenth Circuit's application of the McCarran-Ferguson Act also does not improperly abrogate the FAA as shown by the past precedents of this Court and the legislative history of the McCarran-Ferguson Act. The McCarran-Ferguson Act was described as a means of "restor[ing] the supremacy of the States in the realm of insurance regulation." *Fabe*, 508 U.S. at 499-500; *see also Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996) (the McCarran-Ferguson Act is "to protect state [insurance regulation]. . . . against inadvertent federal intrusion.").[11] "The starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Fabe*, 508 U.S. at 500 (citing *Group Life & Health Insurance Co. v.*

11. The Supreme Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), does not support Petitioner's argument. Petitioner's reliance on citations from petitioner's brief in *Quackenbush* is not binding authority. (Pet. at 23.) Additionally, the Supreme Court in *Quackenbush* did not address the McCarran-Ferguson Act in the decision.

Royal Drug Co., 440 U.S. 205, 210 (1979)). Looking at the language of the McCarran-Ferguson Act the relevant inquiry is does the FAA "specifically relate to the business of insurance"? Clearly, it does not. Additionally, application of the FAA would frustrate the Utah state policy of staying all actions and proceedings against an insolvent insurance company, and interfere with Utah's administrative insurance regime of administering all insurance company liquidations in one forum. *See Humana,* 1999 WL 17679, *7. The Tenth Circuit's decision in the instant case was in complete conformity with the McCarran-Ferguson Act as well as the reasoning of this Court in cases such as *Fabe, Barnett* and *Humana*. Accordingly, the Petition should be denied.

III.

ABSTENTION WAS APPROPRIATE UNDER THE FACTS OF THIS CASE.

Petitioner was not improperly "put out of court" by the rulings of the Utah district court. The crux of Petitioner's argument is that a case involving an insolvent insurance company and the McCarran-Ferguson Act does not involve any of the important state interests that mandate abstention under any of the abstention doctrines. This argument is unpersuasive.

In its most recent discussion of the vitality and scope of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), this Court stated that while federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress this duty is not, however, absolute." *Quackenbush v. Allstate*, 517 U.S. 706, 716 (1996) (*citing Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)).[12]

12. *Colorado River* also discusses two other abstention doctrines adopted by this Court. Under the abstention doctrine adopted in *Younger*

(Cont'd)

Quackenbush also reaffirmed the holding in *New Orleans Public Service, Inc. v. Counsel of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). *NOPSI* held that *Burford* abstention would enable a federal court to abstain from hearing a case and to dismiss the case if adjudication in a federal court " 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Quackenbush*, 517 U.S. at 726-27 (quoting *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814)). Finally, *Quackenbush* held that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush*, 517 U.S. at 731.[13]

(Cont'd)

v. Harris, 401 U.S. 37, 41 (1971), the court will abstain if: (1) the federal court will interfere with ongoing state proceedings of a judicial nature; (2) the ongoing state proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges. The other abstention doctrine may be applied "when considerations of wise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation . . . require abstention."

13. The underlying dispute before the federal court was not a simple contract action as asserted by Petitioner but a petition for an order compelling arbitration. (Resp. App. D.) Petitioner has never sought money damages but instead has sought equitable relief in the form of rescission or specific performance of the contract. (Resp. App. D.) Petitioner sought equitable relief in this case because a petition under section 4 of the FAA "is a request that the court compel specific performance of an agreement to arbitrate." *Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 750 (5th Cir. 1986); *see also Garland v. Garland*, 165 F.2d 131, 133 (10th Cir. 1947) (a grant of specific performance is a grant of equitable relief). Thus, *Burford* abstention is appropriate in this case.

As discussed in *Humana*, the McCarran-Ferguson Act was enacted to preclude the application of federal laws in the face of state laws enacted for the purpose of regulating the business of insurance. 1999 WL 17679, at *5. Under the *Burford* abstention doctrine, any order compelling arbitration would disrupt the insurance liquidation proceedings, interfere with Utah's express and exclusive authority to regulate the insurance business, and interfere with ongoing state proceedings of a judicial nature.

As evidenced by the comprehensive scheme set forth in Utah Code Ann. §§ 31A-27-101 through 411, Utah has a strong interest in the orderly liquidation of insolvent insurers and the orderly resolution of the claims against insolvent insurers such as United Republic. The comprehensive scheme requires that all claims be heard in one, exclusive state court proceeding. Had it not abstained, the district court in this case would have impinged upon important policy considerations and the express preeminence of state law under the McCarran-Ferguson Act by disrupting the orderly liquidation proceedings already underway in state court.

Timely and adequate state review is also available both in the Utah state court and in the Texas Action. The Utah state courts are capable of deciding the arbitrability of the RGA Stock Purchase Agreement without prejudice to Davister's alleged arbitration rights. Petitioner's contention that, by abstaining, the federal courts deprived Petitioner of a forum free of state court bias is unpersuasive. This Court has recognized state court bias as an exception to abstention only in the context of *Younger* abstention. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (exception to *Younger* abstention is where "state proceeding is motivated by a desire to harass or is conducted in bad faith"). Petitioner asserts that *Younger* abstention "is of little import [in this case]." Additionally, there is nothing in

the record before the Tenth Circuit Court of Appeals or this Court that remotely suggests that the state liquidation court is biased.

Finally, Petitioner's reliance on *Grode* is misplaced. Third Circuit law as set forth in *Grode* directly contradicts Davister's argument because the *Grode* court expressly recognized that abstention *is mandated* in a suit *against* an insolvent insurer. *See* 8 F.3d at 959. The court acknowledged in suits where the company is the defendant and there are large numbers of similarly situated plaintiffs competing for limited assets, then a single forum is necessary to prevent the dissipation of funds defending different suits in different forums. *See id.* at 960.

Therefore, the *Burford* abstention doctrine (as well as the other abstention doctrines recognized by this Court) applies. Davister was no improperly put out of court, and thus, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE

U.C.A. 1953 § 31A-27-305

31A-27-305 Actions by and against rehabilitator.

(1) The order for rehabilitation under Section 31A-27-303 automatically stays any action or proceeding in this state in which the insurer is a party or is obligated to defend a party. The stay continues until the rehabilitator obtains proper representation and prepares for further proceedings. The court that entered the rehabilitation order shall order the rehabilitator to take that action respecting pending litigation and other proceedings as the court considers necessary in the interests of justice and for the protection of creditors, policyholders, and the public. The rehabilitator shall immediately evaluate all litigation or other proceedings pending outside this state and shall petition the courts or agencies having jurisdiction over that litigation or those proceedings for stays whenever the rehabilitator determines it necessary to protect the estate of the insurer.

(2) No statute of limitations runs and no defense of laches arises with respect to any action by or against an insurer between the filing of a petition for rehabilitation against an insurer and the denial of the petition or an order of rehabilitation. Any action by the insurer that might have been commenced when the petition was filed may be commenced by the insurer or rehabilitator for at least 60 days after the order of rehabilitation is entered or the petition is denied, or for a longer period if ordered by the court. This subsection does not limit the powers of the rehabilitator to bring actions under Sections 31A-27-319, 31A-27-320, 31A-27-321, 31A-27-322, and other provisions of this chapter.

* * * *

APPENDIX B — LETTER OF THE STATE OF UTAH INSURANCE DEPARTMENT DATED MARCH 23, 1993

State of Utah
INSURANCE DEPARTMENT

* * *

March 23, 1993

Joseph Darrell Jordan, President
United Republic Life Insurance Company
215 South State Street, Suite 775
Salt Lake City, Utah 84111

Re: Surplus Debentures and Capital Stock Issues Reported in 1992 Annual Statement

The Utah Insurance Department has reviewed the 1992 annual statement of United Republic Life Insurance Company (the "Company") and is in the process of an ongoing examination of the Company. That examination and review have disclosed an issue of critical importance. The Company has not complied with the provisions of the Utah Code regarding prior approval for the issuance of surplus debentures and capital stock. The Company's annual statement reflects transactions in which real estate and stock have been acquired by the issuance of surplus debentures that subsequently were redeemed by the issuance of Series B stock or by the direct issuance of Series B. stock.

These transactions did not have the prior written approval of the Department as required by Section 31A-5-305 and/or were not issued under a solicitation permit as required by Section 31A-5-206. These transactions must be reversed until

Appendix B

such time as the Company has complied with these requirements. The assets acquired and the outstanding capital stock issued by the Company as reported in its 1992 annual statement are as follows:

Greenbrook/Brooklane real estate	$3,544,000
Chrysler Technology real estate	3,027,000
Security Park B real estate	836,000
Twin Oaks I & II real estate	2,400,000
Medical Resource Companies of America stock	600,000
TOTAL	$10,407,000

An alternative to the reversal of the transactions may be for the Company to establish an escrow liability for the assets received pending the required approvals. Either action would appear to place the Company in a hazardous condition. We therefore request that the Company not issue any new policies or enter into any new reinsurance treaties until such time as approval is given for these transactions and their appropriateness confirmed.

We request your reply to this letter not later than March 30, 1993.

Sincerely,

Robert E. Wilcox, ASA, FCA, MAAA
Insurance Commissioner

s/ Billy N. Lovelady, CFE, CIE
Chief Examiner

cc: Commissioner Robert E. Wilcox

APPENDIX C — UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 9, 1995

Juna Antonio GARCIA, Insurance Commissioner, Etc., Plaintiff-Appellant,

v.

ISLAND PROGRAM DESIGNER, INC., Defendant, Appellee. United States of America, Intervenor, Appellee.

No. 95-1006

United States Court of Appeals,
First Circuit.

Aug. 9, 1995

* * *

Before SELYA, CYR, and STAHL, Circuit Judges.

PER CURIAM,

This case involves a dispute over the relative priority to be accorded to federal tax claims against an insolvent health maintenance organization. After an earlier opinion in which we held that the federal court had exclusive jurisdiction to hear and determine the competing claims, see Garcia v. Island Program Designer, Inc., 4 F.3d 57, 60 (1st Cir.1993), the district court rejected the position urged by appellant, Puerto Rico's Insurance Commissioner, and ruled that the tax claims asserted by the Internal Revenue Service (IRS) were entitled to priority

over the claims of unpaid health-care providers. See Garcia v. Island Program Designer, Inc., 875 F. Supp. 940, 944 (D.P.R.1994). The Insurance Commissioner then prosecuted the instant appeal.

We will not dawdle. The court below has written a careful, well-reasoned opinion, correctly applying the legal doctrines articulated by the Supreme Court in Department of Treasury v. Fabe, 113 S. Ct. 2202 (1993), and adequately exploring the interplay among the federal priority statute, 31 U.S.C. § 3713, the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and local law, particularly P.R. Laws Ann. tit. 26, § 1914. It is our preferred practice that when, as now, "a trial court has produced a first-rate work product, a reviewing tribunal should hesitate to wax longiloquent simply to hear its own words resonate." In re San Juan Dupont Plaza Hotel Fire Litig., 989 F.2d 36, 38 (1st Cir.1993). That wise adage is fully applicable here. Accordingly, we affirm the entry of summary judgment in the IRS's favor for substantially the reasons elucidated in the opinion below.

Withal, we add one flourish. In the district court, appellant essayed only a fleeting reference to the Chevron principle. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). On appeal, the Commissioner makes Chevron the centerpiece of his argument. This is both too late and too little.

In the first place, it is our settled rule that legal theories not developed in the trial court cannot be splendiforously unveiled on appeal. See Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir.1992). In the second place, the Chevron

principle does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); accord United States v. 29 Cartons of * * * An Article of Food, 987 F.2d 33, 38 n.6 (1st Cir.1993). Consequently, it would be wholly inappropriate for us to defer, as appellant importunes, to what strikes us as nothing more than a position of convenience. In all events, to win our allegiance an administrative agency's statutory interpretation must "flow[ ] rationally from a permissible construction of the statute," Strickland v. Commissioner, Me. Dep't of Human Servs., 48 F.3d 12, 17 (1st Cir.1995), and cannot be " 'arbitrary, capricious, or manifestly contrary to the statute.' " id. at 18 (citation omitted). Appellant's interpretation of P.R. Laws Ann. tit. 26, § 1914 fails this test.

We need go no further. The judgment of the district court must be summarily affirmed. See 1st Cir. Loc. R. 27.1. Affirmed.

APPENDIX D — PETITION FOR ORDER COMPELLING ARBITRATION AND STAY DATED NOVEMBER 7, 1995

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DAVISTER CORPORATION,

Plaintiff/Petitioner,

vs.

UNITED REPUBLIC LIFE INSURANCE COMPANY, and UTAH INSURANCE COMMISSIONER, ROBERT E. WILCOX, LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,

Defendants/Respondents.

PETITION FOR ORDER COMPELLING ARBITRATION AND STAY

Appendix D

Petitioner, Davister Corporation, hereby alleges:

1. This Petition involves a dispute between citizens of different states. Petitioner Davister Corporation ("Davister") is a corporation incorporated in the State of Nevada with its principal place of business in the State of Texas. Respondent United Republic Life Insurance Company ("United Republic") was an insurance corporation incorporated in the State of Utah with its principal place of business in the State of Utah. Robert E. Wilcox is a citizen of the State of Utah. The amount in controversy exceeds $50,000.00. Jurisdiction is, therefore, proper under 28 U.S.C. § 1332.

2. As of December 23, 1992, Davister and United Republic entered into a written Agreement whereby United Republic agreed to purchase from Davister one hundred percent (100%) of the issued and outstanding capital stock of RG Acquisition corporation (RGA"). The principal assets of RGA were certain real property and improvements located in Waco, Texas, known as the "Chrysler Technology Building," and a lease between RGA, as lessor, and Chrysler Technologies Airborne Systems, Inc., as lessee. In consideration, United Republic agreed to issue to Davister 3,027,000 shares of United Republic's Series B Stock. A true and correct copy of the Agreement, less exhibits, is attached and incorporated as Exhibit "A".

3. In paragraph 8(b) of the Agreement attached as Exhibit "A", United Republic agreed to indemnify Davister for any damages it incurred or suffered resulting from or arising out of any misrepresentation, breach of warranty, or non-fulfillment of any agreement or covenant by United republic under the Agreement or any other document delivered by United Republic pursuant to the Agreement or from any misrepresentation or

omission from any certificates, schedule, statement, document, or instrument furnished to Davister pursuant thereto and from any actions incident to any of the foregoing or enforcement in paragraph 8(b).

4. Paragraph 8(f)(i) of the Agreement attached as Exhibit "A" hereto provides for arbitration in Salt Lake city, Utah, of all disputes under paragraph 8. Said paragraph provides:

> (f) *Arbitration*. (i) All disputes under this paragraph shall be settled by arbitration in Salt Lake City, Utah, before a single arbitrator pursuant to the rules of the American Arbitration Association. Arbitration may be commenced at any time by any party hereto giving written notice to each other party to a dispute that such dispute has been referred to arbitration under this paragraph 8. The arbitrator shall be selected by the joint agreement of Seller and Purchaser, but if they do not so agree within 20 days after the date of the notice referred to above, the selection shall be made pursuant to the rules from the panels of arbitrators maintained by such Association. Any award rendered by the arbitrator shall be conclusive and binding upon the parties hereto; provided, however, that any such award shall be accompanied by a written opinion of the arbitrator giving the reasons for the award. This provision for arbitration shall be specifically enforceable by the parties and the decision of the arbitrator in accordance herewith shall be final and binding and there shall be no right of appeal therefrom. Each party shall pay its own expenses of arbitration and the expenses of the arbitrator shall be equally shared;

provided; however, that if in the opinion of the arbitrator any claim for indemnification or any defense or objection thereto was unreasonable, the arbitrator may assess, as part of his award, all or any part of the arbitration expenses of the other party (including reasonable attorneys' fees) and of the arbitrator against the party raising such unreasonable claim, defense or objection; (ii) nothing contained in this paragraph 8(f) shall prevent the parties from settling any dispute by mutual agreement at any time;

5. A controversy has arisen out of this Agreement and comes within the terms of paragraph 8.

6. United Republic represented to Davister that it had taken all necessary steps to issue its Series B Stock and that it had full authority and authorization to issue its stock to Davister. The Insurance Commissioner through the Chief Examiner of the Utah Insurance Department thereafter notified United Republic that the foregoing transaction and other transactions must be reversed because United Republic had not obtained prior approval from the Insurance Department to issue surplus debentures or capital stock.

7. United Republic was subsequently placed in an agreed rehabilitation with the Insurance Commissioner, Robert E. Wilcox, appointed as the Rehabilitator in Civil No. 93-0905603, styled *In re United Republic Life Insurance Co.*, in the Third Judicial District Court of Salt Lake County, Utah.

8. When Wilcox refused to approve the issuance of United Republic's stock to Davister, Davister requested return of the

RGA stock and its assets for lack of consideration. Wilcox has refused to return RGA or its assets to Davister even though he has likewise refused to pay the compensation provided in the Agreement.

9. Respondents initiated a cause of action in the 101st Judicial District Court of Dallas County, Texas, Cause No. 94-03023-E, styled *United Republic Life Insurance Company, In Rehabilitation and Utah Insurance Commissioner, Robert E. Wilcox, Plaintiffs, v. Carmel Realty Services, Ltd., Grapat Group, Inc., and Tara Group, Inc.*, involving claims related to the Chrysler Technology Building. Davister Corporation sought to intervene on the grounds that the claims alleged by the Respondents actually belong to it because the Agreement attached hereto should be rescinded.

10. In the meantime, however, in Civil No. 930905603 CN (now consolidated with Civil No. 930905380 AA, styled *United Republic Life Insurance Co. v. Utah Department of Insurance*, the agreed rehabilitation of United Republic was converted into an involuntary liquidation and the Utah Insurance Commissioner, Robert E. Wilcox, his successor in office, and his appointed deputies were appointed Liquidator of United Republic. The Liquidator was directed to take possession of United Republic and its assets and administrator then under the supervision of the Court. The Utah Court further ordered that all actions and proceedings against United Republic and its separate accounts in Utah and elsewhere by stayed pursuant to Utah law.

11. Based upon the Utah Court's Order, Commission Wilcox obtained an indefinite stay of Davister's claims of rescission and its intervention in the lawsuit in Dallas County, Texas.

Appendix D

12. Subsequently, the other defendants in the Dallas County lawsuit filed claim against Davister, which would also be subject to the arbitration provisions.

13. On November 2, 1995, Petitioner requested the Respondents to proceed with the arbitration of said controversy in the manner provided for in the Agreement, but Respondents have failed to agree to the arbitration or the stay of the proceedings and have otherwise failed to abide by the Arbitration Agreement.

WHEREFORE, Petitioner prays for an order compelling arbitration of the controversy in accordance with the Agreement for an order staying Cause No. 94-03032-E in the 101st Judicial District Court of Dallas County, Texas, *Republic Life Insurance Company In Rehabilitation and Utah Insurance Commissioner, Robert E. Wilcox, Plaintiffs, v. Carmel Realty Services, Ltd., Grapat Group, Inc. and Tara Group, Inc.*, and Civil No. 930905603 CN (consolidated with Civil No. 930905380 AA), in the Third Judicial District Court of Salt Lake County, State of Utah, styled *United Republic Life Insurance Company, a Utah Domiciled Insurance Company v. Utah Department of Insurance, In re: United Republic Life Insurance Company*, and for such other and further relief as the court deems proper.

DATED this 7th day of November, 1995.

s/ Charles P. Sampson
Charles P. Sampson, Esq.
Mark R. Gaylord, Esq.

Kenneth F. Nye, Esq.
Thomas V. Murto, III, Esq.
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(3)

No. 98-875

Supreme Court, U.S.
FILED
FEB 8 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVISTER CORPORATION,

Petitioner,

--v--

UNITED REPUBLIC LIFE INSURANCE COMPANY AND ROBERT E. WILCOX, UTAH INSURANCE COMMISSIONER AND LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-875

DAVISTER CORPORATION,
Petitioner,

--v--

UNITED REPUBLIC LIFE INSURANCE COMPANY AND ROBERT E. WILCOX, UTAH INSURANCE COMMISSIONER AND LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

The circuits are split concerning the proper analysis to determine whether a state statute regulates the "business of insurance," requiring reverse-preemption of a conflicting federal statute pursuant to the McCarran-Ferguson Act. This issue has become a source of confusion among the circuits. Some circuits examine the conduct at issue before analyzing the state statute regulating that conduct. Conversely, other circuits fail to analyze the conduct. The Tenth Circuit, in *Davister*, was among the latter circuits. Without this Court's clarification, the circuits will continue

to issue divergent opinions regarding preemption of federal law by conflicting state statutes enacted for the purpose of regulating the business of insurance.

I. FEDERAL COURTS MUST EXAMINE THE CONDUCT AT ISSUE WHEN RELYING ON THE McCARRAN-FERGUSON ACT'S REVERSE PREEMPTION OF A FEDERAL STATUTE BY A STATE STATUTE.

The McCarran-Ferguson Act leaves the regulation and the taxation of the insurance business to the States. 15 U.S.C. § 1012(a). The threshold question in determining whether the McCarran-Ferguson Act reverse preempts a federal statute is whether the conflicting state statute regulates the "business of insurance."

An inquiry into whether the specific conduct constitutes the business of insurance is supported by the legislative history of the McCarran-Ferguson Act as well as this Court's precedent. As explained by this Court in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1969) (citations omitted):

> The [McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance companies . . .Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. . . .Congress was concerned with the type of state regulation that centers around the contract of insurance. . .The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status

> as reliable insurers that they too must be place in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder.

Thus, even though a state has a statute regulating the challenged conduct, the court must still address whether that statute was meant to fall under the protection of the McCarran-Ferguson Act. This is achieved by first deciding whether the specific conduct at issue constitutes the business of insurance. *United States v. Fabe*, 508 U.S. 491, 505 (1993).

II. THE CIRCUIT COURTS ARE SPLIT ON WHETHER TO CONSIDER THE SUBJECT OF THE STATE'S CONFLICTING STATUTE.

The court, in *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3rd Cir. 1998), describes the conflict among the circuits concerning the analysis to be applied to a state statute for reverse-preemption purposes. The court noted that "federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion." *Id.* at 189 n. 2. For example, the Second, Third, Sixth, and Ninth Circuit use a four-part test which includes a consideration of the parties' conduct,[1] while other courts, including the First and Eighth Circuits, use "a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance." *Id.* Still other courts have noted that this three-part test is simply not relevant in determining what constitutes the business of insurance in a non-

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[1] See *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3rd Cir. 1998); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc.*, 50 F.3d 1486 (9th Cir. 1995); and *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

antitrust context. See *Doe v. Norwest Bank Minn.*, 107 F.3d 1297, 1305 n. 8 (8th Cir. 1997).

This Court, in *Fabe*, examined the subject of a state insurance statute in conflict with a federal statute to determine whether the state statute regulated the "business of insurance." In that case, the liquidator, appointed under Ohio law for an insolvent insurance company, brought a declaratory judgment action to establish the priority of the claims asserted by the United States. The Ohio statute conferred fifth priority upon claims of the United States in proceedings to liquidate insolvent insurance companies. The federal statute accorded first priority to the United States with respect to a bankrupt debtor's federal obligations. This Court concluded that the Ohio priority statute was exempt from preemption under the McCarran-Ferguson Act to the extent it protected policyholders, but it is not a law enacted for the purpose of regulating the business of insurance to the extent that it is designed to further the interests of creditors rather than policyholders. This Court examined the underlying activity -- the enforcement of contracts between the insured and the insurer -- and concluded that the state priority statute did not regulate the "business of insurance." This Court also reemphasized its holding in *SEC* that the focus of the McCarran-Ferguson Act is the relationship between the insurance company and its policyholders. *Fabe*, 508 U.S. at 501.

The Tenth Circuit failed to inquire as to whether the specific conduct between Davister and United Republic constituted the business of insurance. The precise question before the district court was whether to compel specific performance of an arbitration clause in a stock purchase agreement forming part of a real estate transaction. The subject , a real estate contract, had no connection to policyholders or their policies. In fact, United Republic has no policyholders. As Judge Lucero noted in his dissent, "The deliberately narrow holding of *Fabe* forecloses a scope of reverse preemption so broad that it could encompass the arbitration of such a contract." (Pet. App. at 15a.)

Instead of first examining the specific conduct at issue, the Tenth Circuit went directly to an analysis of *Utah Code Ann.* § 31A-27-317(1) under the McCarran-Ferguson Act. The court decided that the Utah statute, which provides that a petition for liquidation stays all actions and proceedings against an insurer, was enacted to regulate the business of insurance. Yet without examining the specific conduct, the Tenth Circuit's analysis of the statute is premature. As Judge Lucero argued in his dissenting opinion, the facts before the court "are not related to the business of insurance as defined in *Fabe*." (Pet. App. 15a.) As a result, the Tenth Circuit's analysis of the Utah statute, without an analysis of the specific conduct, amounts to nothing more than a *per se* stay of all proceedings involving a liquidated insurer. This result is contrary to this Court's precedent and the Congressional intent of the McCarran-Ferguson Act which limits the "business of insurance" to specific conduct directly affecting the relationship between the insurer and the insured. See *SEC*, 393 U.S. at 459-60.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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